ARTICLES

JUDICIAL FEDERALISM IN THE TRENCHES: THE *ROOKER-FELDMAN* DOCTRINE IN ACTION

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I. INTRODUCTION

One little-noticed side effect of the litigation explosion in this country is the exponential growth of federal doctrines designed to simplify complex litigation. Many of these doctrines have been created and applied largely by the lower federal courts—those on the front lines of this kind of litigation—with little guidance from the Supreme Court. Indeed, when the Supreme Court does get around to noticing a problem, it often limits the lower courts' practical solutions without offering any alternatives.[1]

The problem of multiple lawsuits and complex litigation is especially acute when it interacts with questions of judicial federalism. Judicial federalism is the aggregation of issues arising from the existence of two sets of American courts, state and federal. The relationship between state and federal courts has vexed our jurisprudence for

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1 The 1997 Supreme Court term provides two examples of the phenomenon. In *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956 (1998), the Supreme Court disallowed the common lower court practice of keeping for trial cases that had been consolidated for pretrial proceedings under 28 U.S.C. § 1407(a). In *Rivet v. Regions Bank*, 118 S. Ct. 921 (1998), the Court similarly put a stop to the common lower court practice of removing—and then dismissing—cases filed in state court, raising only state claims, but that essentially restated the claims made in an earlier, unsuccessful federal suit. *Cf.* Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (rejecting common lower court use of "hypothetical jurisdiction" to avoid difficult jurisdictional issues that have no effect on the outcome).

more than two hundred years, and it continues to evolve. It has given rise to a vast collection of intersecting doctrines that bedevil judges and litigants alike; one court described an interjurisdictional case as having a "procedural posture" with "all of the trappings of a law school examination."[2]

One of the collateral consequences of having two sets of courts is the problem posed by litigants who, in the words of judges who must deal with them, "refuse to accept adverse decisions"[3] and "repeatedly" subject the courts to "vexatious and unmeritorious litigation."[4] Within a single court system, the relitigation problem can be dealt with relatively easily by utilizing basic preclusion doctrines. But when a losing litigant in one jurisdiction tries his hand again in another, the situation gets more complicated. When a "disappointed litigant . . . regrets its initial decision to litigate its federal claims in state court,"[5] our instincts tell us not to allow a federal suit, but the supporting reasoning can be slippery.

Congress and the courts have crafted a variety of solutions to the problem of these interjurisdictional repeat litigants. Preclusion doctrines can apply across jurisdictions under the Full Faith and Credit Act.[6] In some cases, federal courts have issued injunctions against state suits that interfere with federal jurisdiction or with federal court judgments.[7] Abstention doctrines limit the possibility of parallel litigation and describe a careful procedure circumscribing the appropriate division of questions between the two sets of courts.[8] Under some circumstances, a case in state court can be removed to federal court

2 Ivy Club v. Edwards, 943 F.2d 270, 273 (3d Cir. 1991). Indeed, one recent complicated *Rooker-Feldman* case centered on a divorce action between two "lawyers and former law professors." *See* Catz v. Chalker, 142 F.3d 279, 282 (6th Cir. 1998).

3 Homola v. McNamara, 59 F.3d 647, 651 (7th Cir. 1995).

4 Fariello v. Campbell, 860 F. Supp. 54, 58 (E.D.N.Y. 1994).

5 South Boston Allied War Veterans Council v. Zobel, 830 F. Supp. 643, 651 (D. Mass. 1993).

6 28 U.S.C. § 1738 (1994).

7 *See* All Writs Act, 28 U.S.C. § 1651 (1994); Anti-Injunction Act, 28 U.S.C. § 2283 (1994) (allowing injunctions against state court proceedings in specified circumstances).

8 *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (holding that federal court should abstain in face of parallel state proceedings); England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411 (1964) (limiting circumstances under which federal plaintiff can return to federal court after *Pullman* abstention triggers federal stay).

and then dismissed.[9] And then there is the often overlooked *Rooker-Feldman* doctrine, which is the subject of this Article.

The *Rooker-Feldman* doctrine stems from two Supreme Court cases decided sixty years apart. In *Rooker v. Fidelity Trust Co.*,[10] decided in 1923, the Court held that lower federal courts lack jurisdiction to entertain appeals from state court judgments because that power is reserved to the Supreme Court. For six decades, lower courts applied *Rooker* sporadically, often using it interchangeably with doctrines of preclusion—which were themselves in some disarray.[11] Then in 1983, the Supreme Court decided *District of Columbia Court of Appeals v. Feldman*,[12] clarifying *Rooker* and giving the *Rooker-Feldman* doctrine its name. In *Feldman*, the Court held that lower federal courts have no jurisdiction to hear "challenges to state court decisions in particular cases arising out of judicial proceedings"[13] or to decide questions "inextricably intertwined" with state court judgments.[14] At about the same time as *Feldman*, the Supreme Court also decided a series of preclusion cases, expanding the reach of the Full Faith and Credit Act and limiting federal court authority to reach issues that were (or that might have been) decided by state courts.[15]

Although the Supreme Court has not held a case barred by *Rooker-Feldman* since 1983—and indeed has only mentioned the doctrine three times in the past fifteen years[16]—the doctrine has exper-

9 Although 28 U.S.C. § 1441 permits removal only when the case could have been brought originally in federal court, lower federal courts have sometimes allowed removal when a subsequent state case would interfere with a prior federal judgment. The Supreme Court recently rejected that practice when based on the "artful pleading" doctrine, *see* Rivet v. Regions Bank, 118 S. Ct. 1003 (1998), but at least one court has relied on the All Writs Act to remove (and then dismiss) a case that raised no federal question, *see* NAACP v. Metropolitan Council, 144 F.3d 1168 (8th Cir.), *cert. denied*, 119 S. Ct. 73 (1998).

10 263 U.S. 413 (1923).

11 For a discussion of how lower courts applied *Rooker*, see Williamson B.C. Chang, *Rediscovering the* Rooker *Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L.J. 1337 (1980). See David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317 (1978), for an examination of early preclusion cases.

12 460 U.S. 462 (1983).

13 *Id.* at 486.

14 *Id.* at 483 n.16.

15 *See, e.g.*, Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984); Kremer Chem. Constr., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980).

16 *See* Johnson v. DeGrandy, 512 U.S. 997 (1994) (discussed *infra* note 108); ASARCO, Inc. v. Kadish, 490 U.S. 605, 622–23 (1989) (citing *Rooker-Feldman* doctrine in support of conclusion that Supreme Court has jurisdiction to review state decision despite original plaintiff's lack of standing since losing defendant has no other option in the federal courts); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) (no mention of

ienced explosive growth in the lower courts. Since 1990 alone, lower federal courts have used *Rooker-Feldman* to find jurisdiction lacking in more than 500 cases. At the same time, the lower courts have struggled to define both the doctrine and its relationship to other doctrines, especially res judicata (and, to a lesser extent, *Younger* abstention[17]). While the Seventh Circuit has repeatedly noted that *Rooker-Feldman* and res judicata doctrines "are not coextensive,"[18] other courts have often confused the two. For example, one judge has declared that the *Rooker-Feldman* doctrine "includes within its ambit principles of preclusion,"[19] while another has suggested that the doctrine is merely a "[j]urisdictional recasting of preclusion questions."[20] One circuit has merged the two doctrines, holding that *Rooker-Feldman* does not bar the action "when that same action would be allowed in the state court of the rendering state."[21] Another court described *Rooker-Feldman* as "a combination of the abstention and res judicata doctrines."[22] Even within the Seventh Circuit there is some confusion; the usually scrupulous Judge Easterbrook has written that "a judgment that is not entitled to full faith and credit does not acquire extra force

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Rooker-Feldman in majority opinion; however, four separate opinions, representing six Justices, found that *Rooker-Feldman* does not bar; Justice Marshall's separate opinion concludes that *Rooker-Feldman* does bar, but then he joins two other opinions that both explicitly found no *Rooker-Feldman* bar); *cf.* Chicago v. International College of Surgeons, 118 S. Ct. 523, 535 (1997) (Ginsburg, J., dissenting) (citing *Rooker* case for proposition that "[c]ross-system appellate authority is entrusted to this Court"); Heck v. Humphrey, 512 U.S. 477, 485–86 (1994) (citing *Rooker* case for proposition that collateral attack in federal courts is disfavored).

17 *See* Younger v. Harris, 401 U.S. 37 (1971). At least one court has also confused the *Rooker-Feldman* doctrine with the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). In *First Commercial Trust Co. v. Colt's Manufacturing*, 77 F.3d 1081 (8th Cir. 1996), the Eighth Circuit held that *Rooker-Feldman* prohibited it from reconsidering or refusing to apply valid Arkansas Supreme Court precedent in a diversity case. The controlling Arkansas case was entirely unrelated to the case at bar, although the cases were predicated on the same theory of liability (rejected by the Arkansas Supreme Court).

18 GASH Assocs. v. Village of Rosemont, 995 F.2d 726, 728 (7th Cir. 1993). *See also* Garry v. Geils, 82 F.3d 1362, 1365 (7th Cir. 1996) (citing *GASH*, 995 F.2d at 728).

19 Guess v. Board of Med. Exam'rs, No. 91-264-CIV-5-F, 1991 WL 352536, at *6 (E.D.N.C. Sept. 12, 1991), *aff'd*, 967 F.2d 998 (4th Cir. 1992).

20 Cross-Sound Ferry Servs. v. ICC, 934 F.2d 327, 343 (D.C. Cir. 1991) (Thomas, J., dissenting).

21 Davis v. Bayless, 70 F.3d 367, 376 (5th Cir. 1995).

22 United States v. Owens, 54 F.3d 271, 274 (6th Cir. 1995). *See also* White's Place, Inc. v. Glover, 975 F. Supp. 1333, 1339 (M.D. Fla. 1997) (discussing *Rooker-Feldman* and *Younger* abstention interchangeably); United States v. Lewis, 936 F. Supp. 1093, 1106, 1108 (D.R.I. 1996) (describing *Rooker-Feldman* as a type of abstention).

via the *Rooker-Feldman* doctrine."[23] Courts also blend their discussion of the two doctrines, going back and forth between *Rooker-Feldman* principles and preclusion principles without explaining how the two are related.[24]

The few commentators who have focused on the *Rooker-Feldman* doctrine have generally criticized it as either redundant or inappropriate: to the extent that it overlaps with preclusion law or *Younger* abstention, it is unnecessary;[25] to the extent that it goes beyond those doctrines, it is inconsistent with Congress's intent in the Full Faith and Credit Act to give preclusive effect to a state court judgment only when a state court would do so.[26] Part of the problem is that both *Rooker* and *Feldman* were decided before the Supreme Court's recent reinvigoration of the Full Faith and Credit Act, and thus might now be seen as unnecessary substitutes for the application of state res judicata principles. *Rooker* was also decided decades prior to *Younger v. Harris*,[27] which, when added to preclusion law, is viewed by many commentators as a sufficient alternative to *Rooker-Feldman*.

But a review of the cases in which lower courts have held that the *Rooker-Feldman* doctrine precludes jurisdiction shows that there are gaps in the other doctrines. Some of these are situations in which we

23 Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1350 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc). *See also* United States v. Borneo, Inc., 971 F.2d 244, 257 n.3 (9th Cir. 1992) (Reinhardt, J., dissenting in part) ("If the full faith and credit statute does not bar a refusal to accord preclusive effect to a particular state court judgment, it defies logic and fairness to hold that such a refusal is nonetheless barred by *Rooker* and *Feldman*.").

24 *See, e.g.*, McKinnis v. Morgan, 972 F.2d 351 (7th Cir. 1992) (unpublished table decision); Guess v. Board of Med. Exam'rs, 967 F.2d 998 (4th Cir. 1992); Fielder v. Credit Acceptance Corp., 10 F. Supp.2d 1101 (W.D. Mo. 1998); Edmonds v. Clarkson, 996 F. Supp. 541 (E.D. Va.), *aff'd per curiam*, Nos. 98-1495, 98-1612, 1998 WL 764808 (4th Cir., Nov. 3, 1998); Thaler v. Casella, 960 F. Supp. 691 (S.D.N.Y. 1997).

25 *See, e.g.*, RICHARD FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1503 (4th ed. 1996); 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 665–66 (1981); Gary Thompson, *The* Rooker-Feldman *Doctrine and the Subject Matter Jurisdiction of the Federal Courts*, 42 RUTGERS L. REV. 859 (1990); *see also* Chang, *supra* note 11 (suggesting, before the *Feldman* case, that *Rooker* is simply a jurisdictional version of res judicata); *cf.* Marcel Kahan & Linda Silberman, Matsushita *and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 253 n.122 (labelling *Rooker-Feldman* doctrine "somewhat peculiar").

26 *See* Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 341 (1988); Paul Henry Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1193–94 & n.217 (1998); Thompson, *supra* note 25, at 912–13.

27 401 U.S. 37 (1971).

would all agree that the federal court lacks jurisdiction—in which case *Rooker-Feldman* is a necessary and important doctrine. Moreover, preclusion law and *Rooker-Feldman* serve different purposes. Distinguishing *Rooker-Feldman* from related doctrines and demonstrating the need for its least controversial versions is the goal of Part II of this Article. In Part III, I turn to some of the most important judicial disagreements about the full scope of the doctrine. Finally, I offer an illustrative case and some concluding comments in Part IV.

II. WHAT IS THE *ROOKER-FELDMAN* DOCTRINE AND WHY DO WE NEED IT?

A. *General Principles*

If we start from agreement on the core principle of *Rooker*, we can sketch a series of hypotheticals—based on common *Rooker-Feldman* scenarios actually litigated in the federal courts—that will illustrate the uncontroversial contours of the doctrine as well as how it differs from preclusion doctrines both in purpose and in practice.

1. Obvious appeals. First, it seems obvious that a suit filed in federal court purporting to be an "appeal" of a state court judgment should be dismissed on jurisdictional grounds. This rule is the primary holding of *Rooker* itself. This primary holding is usually defended as a necessary implication of the statutory scheme of jurisdiction. Under that scheme, federal district courts are courts of original, not appellate, jurisdiction, and the United States Supreme Court has the authority to review judgments of the highest state courts. In addition, there are strict time limits for removing cases from state to federal court, suggesting that they may not be "removed" after judgment. Courts have thus concluded that *only* the United States Supreme Court has the power to review state court judgments.[28]

28 The statutory basis of the doctrine, of course, leaves room for exceptions, and courts have recognized several. First, it is uniformly acknowledged that the writ of habeas corpus is an exception to the prohibition against lower federal court review of state judgments. *See, e.g.*, Dale v. Moore, 121 F.3d 624, 627–28 (11th Cir. 1997); Plyler v. Moore, 129 F.3d 728, 732 (4th Cir. 1997); Young v. Murphy, 90 F.3d 1225, 1230 (7th Cir. 1996); Blake v. Papadakos, 953 F.2d 68, 71 (3d Cir. 1992).

Several courts have interpreted the Resolution Trust Removal Statute, 12 U.S.C. § 1441a(*l*)(3)(A)(1994), to allow removal after judgment, constituting another exception. *See* RTC v. Nernberg, 3 F.3d 62 (3d Cir. 1993); *In re* Meyerland Co., 910 F.2d 1257 (5th Cir. 1990), *superseded on other grounds*, 960 F.2d 512 (5th Cir. 1992) (en banc); *see also* RTC v. Allen, 16 F.3d 568 (4th Cir. 1994) (allowing postjudgment removal by RTC without discussing *Rooker-Feldman*); Sweeney v. RTC, 16 F.3d 1 (1st Cir. 1994) (same); Lester v. RTC, 994 F.2d 1247 (7th Cir. 1993) (same); *In re* 5300 Memo-

2. Disguised appeals. What if a somewhat more savvy federal court plaintiff leaves off the "appeal" heading, but nevertheless asks the federal court to reverse, nullify, or enjoin the execution of a state court civil judgment? Certainly the federal court should not do so, but the question remains whether the *Rooker-Feldman* doctrine is necessary to accomplish that result.

If the plaintiff asks for an injunction against the state court proceedings, the Anti–Injunction Act will serve the purpose—unless the plaintiff is smart enough to invoke § 1983, an express exception to the Act.[29] In that case, or if the plaintiff seeks instead a declaratory judgment, the principles of *Younger v. Harris*[30] may prohibit the court from granting relief—but only if the state suit is ongoing and only if it implicates important state interests. Lower courts may hold the latter requirement satisfied even in routine civil cases after *Pennzoil Co. v. Texaco, Inc.*,[31] but in many cases the federal plaintiff will be seeking

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rial Investors, Ltd., 973 F.2d 1160 (5th Cir. 1992) (same); Ward v. RTC, 972 F.2d 196 (8th Cir. 1992) (same).

At least one court has also recognized that the *England* procedure, which gives a right to return to federal court to a party whose federal suit has been stayed, is a judicially-created exception to the *Rooker-Feldman* doctrine. *See* Ivy Club v. Frank, 943 F.2d 270 (3d Cir. 1991); *see also* England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411 (1964).

The Child Support Recovery Act, 18 U.S.C. § 228 (1994) (the "deadbeat dads" law) (CSRA) may be another exception, although courts are having some difficulty with it. The CSRA provides criminal penalties for failure to obey state child support orders, but allows defendants to present various defenses. Several district courts have invalidated the CSRA on the ground that it allows federal courts to revisit issues already litigated in state court and thus violates principles of federalism and comity. *See* United States v. Bailey, 902 F. Supp. 727 (W.D. Tex. 1995), *rev'd*, 115 F.3d 1222 (5th Cir. 1997); United States v. Schroeder, 894 F. Supp. 360 (D. Ariz 1995), *rev'd sub nom.* United States v. Mussari, 95 F.3d 787 (9th Cir. 1996). These courts did not discuss *Rooker-Feldman*. One court actually discussed the possibility that *Rooker-Feldman* might preclude federal jurisdiction, but then concluded that the defenses were not inextricably intertwined with the state court judgment. *See* United States v. Lewis, 936 F. Supp. 1093, 1108 (D.R.I. 1996). Given the statutory basis for *Rooker-Feldman*—and the clear power of Congress to authorize lower federal courts to override state judgments in such contexts as habeas corpus—the best analysis of the CSRA would be to uphold it as a statutory exception to *Rooker-Feldman*.

29 *See, e.g.*, Mitchum v. Foster, 407 U.S. 225 (1972).

30 401 U.S. 37 (1971).

31 481 U.S. 1 (1987). Lower courts have been applying *Younger* to routine civil cases. *See, e.g.*, Morrow v. Winslow, 94 F.3d 1386 (10th Cir. 1996) (adoption); Kelm v. Hyatt, 44 F.3d 415 (6th Cir. 1995) (divorce); Mann v. Conlin, 22 F.3d 100 (6th Cir. 1994) (domestic relations); Schall v. Joyce, 885 F.2d 101 (3d Cir. 1989) (creditor-debtor relations; implication that *Younger* applies to any civil case in which a judgment has been entered and appeal is pending); Owens-Illinois, Inc. v. Levin, 792 F. Supp. 429 (D. Md. 1992) (tort); Alleghany Corp. v. Haase, 708 F. Supp. 1507 (W.D.

relief from a final judgment and thus *Younger* will not apply.[32] Indeed, most courts recognize this distinction between *Younger* and *Rooker-Feldman.*[33] Moreover, plaintiffs often seek damages or injunctive relief not directed toward the state court proceeding, and even if the state proceedings are ongoing, *Younger* might not bar these claims.[34]

Res judicata is another possible alternative to *Rooker-Feldman.* In the straightforward "appeal" that is disguised as a new suit, *Younger* and preclusion doctrines will ordinarily cover much of the territory. If the state suit is ongoing and the federal plaintiff seeks injunctive or declaratory relief against the state proceeding, *Younger* will bar the federal suit; if the state judgment is final, res judicata will bar relitigation of issues that were or could have been raised.

But what if the federal plaintiff does not seek to enjoin the state proceeding, and state appeals are still pending? In this case, as we have already seen, *Younger* does not apply, and in some states interlocutory or appealable orders are given no preclusive effect.[35] Here the *Rooker-Feldman* doctrine, as it is generally used in the lower courts, seems both necessary and appropriate. The majority rule is that the state court judgment need not be a final order from the state's highest court.[36] For the federal court to award damages—or even to reach

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Wisc. 1989) (insurance), *rev'd on other grounds,* 986 F.2d 1046 (7th Cir. 1990), *vacated as moot sub nom.*, Dillon v. Alleghany Corp., 499 U.S. 933 (1991); Ganoe v. Lummis, 662 F. Supp. 718 (S.D.N.Y. 1987), *aff'd,* 841 F.2d 1116 (2d Cir. 1988) (decedents' estates).

32 *See, e.g.*, Guarino v. Larsen, 11 F.3d 1151 (3d Cir. 1993); Leaf v. Supreme Court of Wisc., 979 F.2d 589 (7th Cir. 1992).

33 *See, e.g.*, Aiona v. Judiciary of the State of Haw., 17 F.3d 1244, 1250 n.10 (9th Cir. 1994); *Guarino,* 11 F.3d at 1151; News-Journal Corp. v. Foxman, 939 F.2d 1499, 1510 n.13 (11th Cir. 1991); Partington v. Gedan, 961 F.2d 852 (9th Cir. 1992); White v. Judicial Inquiry and Review Bd., 744 F. Supp. 658, 664 (E.D. Pa. 1990).

34 The Supreme Court has so far declined to decide whether a suit for monetary damages comes within the *Younger* doctrine. *See* Deakins v. Monaghan, 484 U.S. 193, 202 (1988).

35 *See* Howard Erichson, *Interjurisdictional Preclusion,* 96 MICH. L. REV. 945, 973 & nn.129–34 (1998) (listing six states in which judgment pending appeal is not final for purposes of preclusion).

36 *See, e.g., In re* General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133 (3d Cir. 1998); Jordahl v. Democratic Party of Va., 122 F.3d 192 (4th Cir. 1997), *cert. denied,* 118 S. Ct. 856 (1998); Richardson v. District of Columbia Court of Appeals, 83 F.3d 1513 (D.C. Cir. 1996); Campbell v. Greisberger, 80 F.3d 703 (2d Cir. 1996); Charchenko v. City of Stillwater, 47 F.3d 981, 983 n.1 (8th Cir. 1995); Lancellotti v. Fay, 909 F.2d 15, 17 (1st Cir. 1990); Hel v. Harney, 786 F.2d 688, 691 (5th Cir. 1986); *see also* Andrew M. Apfelberg, Rooker-Feldman*: The "New" Abstention Doctrine for Practitioners in the Ninth Circuit,* 17 AM. BANKR. INST. J. 1 (1998); Michael Finch & Jerome Kasriel, *Federal Court Correction of State Court Error: The Singular Case on*

the merits of the case—seems to offend the basic principle that lower federal courts have no appellate jurisdiction over state courts. Thus, most lower courts conclude that if the relief sought by the federal plaintiff would effectively nullify or modify a state court judgment or if a ruling for the plaintiff would necessarily depend on a finding that the state court judgment was erroneous, *Rooker-Feldman* bars the suit.

3. Functional equivalents of appeals. So far we have been considering only relatively obvious attempts to disguise "appeals," but disappointed state litigants often engage in trickier tactics. The most common situation in which courts have found they lack jurisdiction under *Rooker-Feldman* involves a losing state court *defendant* who sues not only the state court plaintiff but also the state court judge (and sometimes other new parties as well). Since the harm alleged in the federal suit does not arise from the same transaction as the original state suit, it is a new claim and ordinarily will not be barred by res judicata principles. Indeed, the federal claim—which seeks to rectify the harm done by the state suit itself—could not have been brought in the original suit. This is especially obvious when the federal court plaintiff sues the state court judge; the cause of action did not even arise until the state suit was terminated unfavorably. Additionally, since some states still adhere to mutuality requirements, the mere addition of new parties will prevent the full application of preclusion doctrines in some cases.[37]

Often the federal plaintiff will allege that the judgment against him was the result of fraud or conspiracy; although principles of res judicata do not always bar such claims, courts have held that *Rooker-Feldman* precludes jurisdiction.[38] The federal plaintiff might also al-

Interstate Custody Disputes, 48 OHIO ST. L.J. 927, 976 (1987); Thompson, *supra* note 25, at 895–96; Benjamin Smith, Note, Texaco, Inc. v. Pennzoil Co.: *Beyond a Crude Analysis of the* Rooker-Feldman *Doctrine's Preclusion of Federal Jurisdiction*, 41 U. MIAMI L. REV. 627, 636–41 (1987); *cf.* Wu v. State Bar of Cal., 953 F. Supp. 315, 321 n.11 (C.D. Cal. 1997) (describing Ninth Circuit precedent as holding that suits challenging unappealed lower state court judgments should be dismissed for failure to state a claim rather than on jurisdictional grounds, which "achieve[s] the same ends"). *But see* RTC v. Bayside Developers, 43 F.3d 1230, 1237 n.5 (9th Cir. 1994) (dicta); *In re* Meyerland Co., 960 F.2d 512, 516 (5th Cir. 1992) (en banc); Bowen v. Doyle, 880 F. Supp. 99, 133 (W.D.N.Y. 1995).

37 *See* Erichson, *supra* note 35, at 966–67 & nn.80–88 (1998) (listing nine states that still adhere to mutuality requirements).

38 *See, e.g.*, Smith v. Weinberger, 994 F. Supp. 418 (E.D.N.Y. 1998); Long v. Shorebank Dev. Corp., No. 97-C-7289, 1998 WL 30696 (N.D. Ill. Jan. 22, 1998); Levitin v. Homburger, 932 F. Supp. 508 (S.D.N.Y. 1996), *aff'd*, 107 F.3d 3 (2d Cir. 1997) (unpublished table decision). *But see* Fielder v. Credit Acceptance Corp., 10 F. Supp. 2d 1101, 1104 (W.D. Mo. 1998) (citing cases); *cf.* Catz v. Chalker, 142 F.3d 279 (6th

lege that the state court lacked jurisdiction over him. Although a *state* court might examine such a claim and refuse to give preclusive effect to the earlier judgment if jurisdiction was actually lacking, a lower federal court should not have jurisdiction to override the original court's determination of its own jurisdiction, at least when the party contesting jurisdiction appeared and litigated the jurisdictional issue.[39]

Again, *Rooker-Feldman* seems necessary to prevent state court defendants from using the federal courts as an avenue to appeal or attack state court judgments. And again, lower federal courts have used *Rooker-Feldman* to prevent just such an end run around res judicata principles. In most circuits, the standard description of the doctrine easily encompasses these cases. Most circuits describe *Rooker-Feldman* as barring any suit in which federal relief would nullify or modify the state judgment[40] or in which the federal court cannot rule for the

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Cir. 1998) (holding that *Rooker-Feldman* does not bar due process challenge to procedures leading to divorce decree in state court, because challenged procedures were not "inextricably intertwined" with merits of decree).

39 *See, e.g.*, Snider v. Excelsior Springs, 154 F.3d 809 (8th Cir. 1998); Ashton v. Cafero, 920 F. Supp. 35 (D. Conn. 1996); Brooks-Jones v. Hones, 916 F. Supp. 280 (S.D.N.Y. 1996).

A default judgment attacked for lack of jurisdiction is different because the party did not have a full and fair opportunity to litigate the question without forfeiting the very protection that personal jurisdiction doctrines are designed to afford. To hold otherwise would be to *require* a defendant to litigate jurisdictional issues in the forum he claims has no jurisdiction over him. A defaulting defendant is permitted to raise a personal jurisdiction challenge collaterally in a suit to enforce the default judgment, whether in state or federal court. *See* Pennoyer v. Neff, 95 U.S. 714 (1877); WRIGHT ET AL., *supra* note 25, § 4430, at 291–94. It would be perverse to require such a defendant to wait for an enforcement action rather than bringing an anticipatory suit. When the defendant appears and litigates the jurisdiction question in the original suit, however, he is not permitted to use lack of personal jurisdiction as a defense in a subsequent enforcement action. *See, e.g.*, Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931). Thus it is not problematic for *Rooker-Feldman* to bar the anticipatory federal suit.

A suit by absent class members challenging a class action judgment may also be different for the same reason. Absent class members ordinarily have neither an opportunity nor an incentive to litigate jurisdictional objections. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985); Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1350–53 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc). For discussions of class members' participation (or lack thereof) in lawsuits, see, for example, Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997); Monaghan, *supra* note 26; Patrick Wooley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997).

40 *See, e.g.*, Gulla v. North Strabane Township, 146 F.3d 168, 171 (3d Cir. 1998) ("void [the state court's] ruling"); Jones v. Crosby, 137 F.3d 1279, 1280 (11th Cir. 1998) ("review, reverse, or invalidate"); Bates v. Jones, 131 F.3d 843, 856 (9th Cir.

plaintiff without holding the state court judgment erroneous.[41] A losing state defendant cannot prevail in his federal suit against his state court adversary (to say nothing of his suit against the state court judge) without a federal finding that the state court judgment was erroneous. The Seventh Circuit has made even more explicit this important aspect of *Rooker-Feldman.* That court characterizes *Rooker-Feldman* as applicable whenever "the injury alleged by the federal plaintiff resulted from the state court judgment itself," rather than being distinct from, and unremedied by, the judgment.[42]

Even when the losing state court *plaintiff* brings the federal suit, res judicata will not always be sufficient to justify dismissal. For example, if the state court plaintiff sues the state court judge or someone else not a party to the state suit, res judicata will not bar the federal suit if the state adheres to mutuality requirements. Even if nonmutual defensive preclusion is permitted, the federal suit may not be precluded if the plaintiff recasts his complaint to state new causes of action that could not have been litigated in the state suit because they

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1997) (en banc) ("reverse or modify"); Moccio v. New York State Office of Court Admin., 95 F.3d 195, 198 (2d Cir. 1996) (same); Goetzman v. Agribank, 91 F.3d 1173, 1177 (8th Cir. 1996) ("would change the state court result"); Powell v. Powell, 80 F.3d 464, 467 (11th Cir. 1996) ("effectively nullify"); FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1996) ("render [the state] judgment ineffectual"); Charchenko v. Stillwater, 47 F.3d 981, 983 (8th Cir. 1995) ("effectively reverse the state court decision or void its ruling"); Landers Seed Co. v. Champaign Nat'l Bank, 15 F.3d 729, 732 (7th Cir. 1994) ("effectively reverse"); Howell v. Supreme Court of Tex., 885 F.2d 308, 311 (5th Cir. 1989) ("reverse or modify"); Stern v. Nix, 840 F.2d 208, 212 (3d Cir. 1988) ("effectively reverse"); Anderson v. Colorado, 793 F.2d 262, 263 & 264 (10th Cir. 1986) ("reverse or modify"; "undo"); Kevorkian v. Thompson, 947 F. Supp. 1152, 1165 (E.D. Mich. 1997) ("modifying . . . or vacating"); U.S. Indus., Inc. v. Laborde, 794 F. Supp. 454, 464–65 (D.P.R. 1992) ("review, modify, or nullify").

41 *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring) ("if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it"); Catz v. Chalker, 142 F.3d 279, 293 (6th Cir. 1998) (same); Jordahl v. Democratic Party of Va., 122 F.3d 192, 202 (4th Cir. 1997) ("in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously entered"); *Moccio*, 95 F.3d at 200 (quoting *Pennzoil*); *FOCUS*, 75 F.3d at 840 (same as *Jordahl*); Datz v. Kilgore, 51 F.3d 252, 253–54 (11th Cir. 1995) (quoting *Pennzoil*); Keene Corp. v. Cass, 908 F.2d 293, 296–97 (8th Cir. 1990) (quoting *Pennzoil*); Ricotta v. California, 4 F. Supp.2d 961, 979 (S.D. Cal. 1998) ("assess the validity of state court judgments").

42 Garry v. Geils, 82 F.3d 1362, 1365 (7th Cir. 1996); *accord* Centres, Inc. v. Town of Brookfield, 148 F.3d 699, 702 (7th Cir. 1998); Young v. Murphy, 90 F.3d 1225, 1231 (7th Cir. 1996); Levin v. Attorney Registration and Disciplinary Comm'n, 74 F.3d 763, 766 (7th Cir. 1996); GASH Assocs. v. Village of Rosemont, 995 F.2d 762, 729 (7th Cir. 1993).

arise from the suit itself. In *Feldman*, for example, the plaintiffs argued that the District of Columbia court violated their constitutional rights when it denied them admission to the bar; that question might not have been precluded under ordinary principles of res judicata. Similarly, when a state court plaintiff seeks an injunction or a declaratory judgment, the state court's failure to issue the requested relief may itself cause harm.

The Seventh Circuit recognizes both that it is more difficult for a state plaintiff to complain of harm from the judgment itself and that it is nevertheless possible. It has thus adopted what it calls a "general guideline": "If the federal plaintiff was the plaintiff in state court, he must contend with res judicata; if the federal plaintiff was the defendant in state court, he must contend with the *Rooker-Feldman* doctrine."[43] Nevertheless, this distinction is only a guideline and the Seventh Circuit, like other circuits, has found that *Rooker-Feldman* bars jurisdiction even in some cases in which the federal suit was brought by the state court plaintiff.[44]

4. Nonappeals not barred. On the other hand, not every state court decision triggers *Rooker-Feldman.* In *Larsen v. Senate of the Commonwealth of Pennsylvania,*[45] for example, a federal court correctly rejected a *Rooker-Feldman* argument. In that case, Larsen, a Pennsylvania Supreme Court Justice, first brought suit in state court against the Pennsylvania Senate, seeking an injunction against imminent impeachment proceedings. The state court "declined to address the propriety of the Senate's actions, concluding that the impeachment provisions of the Pennsylvania Constitution commit the impeachment power to the Senate" and thus prohibit state court intervention.[46] After Larsen was impeached, he filed suit in federal court, alleging that the impeachment proceedings violated his federal constitutional rights. The federal district court held that it had jurisdiction because granting the requested relief against the state senate would not under-

43 *Centres, Inc.*, 148 F.3d at 702; *accord Kamilewicz*, 92 F.3d at 510; *Garry*, 82 F.3d at 1367; Nesses v. Shepard, 68 F.3d 1003, 1004 (7th Cir. 1995).

44 *See, e.g., In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133 (3d Cir. 1998); Branson v. Nott, 62 F.3d 287 (9th Cir. 1995); Landers Seed Co. v. Champaign Nat'l Bank, 15 F.3d 729 (7th Cir. 1994); Shepherdson v. Nigro, 5 F. Supp. 2d 305 (E.D. Pa. 1998); Foulke v. Foulke, 896 F. Supp. 158 (S.D.N.Y. 1995).

45 955 F. Supp. 1549 (M.D. Pa. 1997), *modified in part on other grounds*, 965 F. Supp. 1549, *rev'd on other grounds*, 152 F.3d 240 (3d Cir. 1998), *and rev'd in part on other grounds*, 154 F.3d 82 (3d Cir. 1998).

46 *Id.* at 1558.

mine or call into question the state court's ruling that *it* lacked authority to enjoin the impeachment proceedings.

B. Distinguishing Res Judicata

Courts have had particular difficulty distinguishing between *Rooker-Feldman* and res judicata doctrines in the context of claims that the plaintiff could have raised in the state court but did not. Although each doctrine contains a specific test to determine when claims are barred, courts often confuse the two.

Rooker-Feldman bars only claims actually litigated or claims "inextricably intertwined" with those actually litigated. The most useful—and frequently quoted—definition of "inextricably intertwined" comes from Justice Marshall's concurrence in *Pennzoil Co. v. Texaco, Inc.*[47] After recognizing that determining whether a federal claim is "inextricably intertwined" with a state judgment is difficult, Justice Marshall went on to note:

> [I]t is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issue before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.[48]

Res judicata doctrines, on the other hand, generally preclude all claims arising from the same transaction, whether or not the claims were raised in the state court.[49] Although lower courts sometimes appear to use "inextricably intertwined" and "could have been raised" interchangeably,[50] the best interpretation of *Rooker-Feldman* is the Sev-

47 481 U.S. 1 (1987). Although five Justices explicitly disagreed with Marshall's conclusion that *Rooker-Feldman* barred the particular case, none took issue with his definition.

48 *Id.* at 25 (Marshall, J., concurring).

49 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

50 *E.g.*, Edmonds v. Clarkson, 996 F. Supp. 541, 548 (E.D. Va.) ("Claims that fall within the ambit of the 'inextricably intertwined' construction of the preclusive principles of *Rooker-Feldman* include federal constitutional claims which could have been brought in the state proceedings but were not."), *aff'd per curiam*, Nos. 98-1495, 98-1612, 1998 WL 764808 (4th Cir. Nov. 3, 1998); Kirby v. Philadelphia, 905 F. Supp. 222, 226 (E.D. Pa. 1995) (suggesting that Third Circuit had adopted test that *Rooker-Feldman* barred any claims that "were raised or could have been raised in state court"); Leonard v. Suthard, 737 F. Supp. 921, 923 (W.D. Va. 1990) (holding that res judicata analysis of whether claim could have been raised in earlier proceeding was "largely parallel to" *Rooker-Feldman* analysis of whether claim is inextricably intertwined with state court ruling), *aff'd*, 927 F.2d 168 (4th Cir. 1991).

enth Circuit's recognition that "a constitutional claim is not 'inextricably intertwined' merely because it could have been raised, but was not, in the earlier state proceeding."[51] In addition to the Seventh Circuit's explicit statement that the two tests are not interchangeable, the D.C. Circuit has implicitly recognized that claims not raised in state court should be independently examined under both res judicata and *Rooker-Feldman* principles; resolution of one issue does not dispose of the other.[52]

Thus, in *Feldman* itself, the Supreme Court held that the lower federal court had jurisdiction over the general challenge to D.C. bar regulations—a claim that was not raised in the state proceedings, although perhaps it could have been—because it was not inextricably intertwined with the specific attack on the state court's denial of plaintiffs' application for admission to the bar. Nevertheless, the Court noted that it "expressly [did] not reach the question of whether the doctrine of res judicata forecloses litigation" on the general claim.[53] On the other hand, as noted earlier, claims may be barred by *Rooker-Feldman* even if they are not barred by preclusion doctrines.

Judicial confusion about the relationship between the "inextricably intertwined" prong of *Rooker-Feldman* and the "could have been raised" prong of claim preclusion is illustrated by a conflicting trio of cases in the Second Circuit. In *Moccio v. New York State Office of Court Administration*,[54] the Second Circuit equated the two doctrines: "the Supreme Court's use of 'inextricably intertwined' means, at a minimum, that where a federal plaintiff had an opportunity to litigate a claim in a state proceeding . . . , subsequent litigation of the claim will be barred under the *Rooker-Feldman* doctrine if it would be barred under principles of preclusion."[55] The court cited Justice Marshall's concurring opinion in *Pennzoil Co. v. Texaco, Inc.*[56] in support of its

51 Ritter v. Ross, 992 F.2d 750 (7th Cir. 1993). *See also* Stanton v. District of Columbia Court of Appeals, 127 F.3d. 72 (D.C. Cir. 1997) (concluding that one of plaintiff's claims was not barred by *Rooker-Feldman* because it was not inextricably intertwined with his litigated claims, and then determining whether it was nevertheless barred under preclusion doctrines dealing with claims that could have been raised but were not); Guess v. Board of Med. Exam'rs, 967 F.2d 998 (4th Cir. 1992) (noting that even when the *Rooker-Feldman* doctrine does not bar a claim, it "does not preclude the application of res judicata").

52 *See Stanton*, 127 F.3d at 72.

53 District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 487–88 (1982).

54 95 F.3d 195 (2d Cir. 1996).

55 *Id.* at 199–200.

56 481 U.S. 1, 25 (1987) (Marshall, J., concurring)

conflation of res judicata and *Rooker-Feldman*.[57] But as *Feldman*'s treatment of the general claims shows, the *Moccio* court overstated the reach of *Rooker-Feldman* by making it coextensive with res judicata.

A district court case decided only a month before *Moccio* (*Khal Charidim Kiryas Joel v. Village of Kiryas Joel*[58]), on the other hand, cited the Second Circuit's own opinion in *Pennzoil* to hold that *Rooker-Feldman* does not necessarily preclude "'federal review of issues which a party could have raised in the state court proceeding.'"[59] The district court properly noted that the *Rooker-Feldman* test is not the same as preclusion principles, but is instead "whether the federal district court would necessarily have to determine that the state court erred in order to find that the federal claims have merit."[60]

But the *Kiryas Joel* court erred in the other direction by overlooking a second way that a federal court claim might be inextricably intertwined with a state court judgment: if granting the requested relief would nullify a state court judgment, then the federal court is in effect reviewing the state court *judgment* even if it is not reviewing the *decision*. Thus in *Kiryas Joel*, the federal court was asked to issue an injunction prohibiting the defendants from "interfering with plaintiffs' use of" a contested piece of property; the state court had already issued an order enjoining the federal plaintiffs' use of the same property. Other courts have recognized that granting a federal injunction that "effectively enjoin[s] the enforcement of [an] earlier order of the . . . state court" is barred by *Rooker-Feldman*.[61] By phrasing the *Rooker-Feldman* question narrowly in terms of whether the federal plaintiffs raised issues necessarily decided by the state court, and not in terms of the ultimate effect of the federal relief on the state court's judgment, the *Kiryas Joel* court unnecessarily narrowed the reach of *Rooker-Feldman*.

A different judge in the Southern District of New York, acting only a few months before *Kiryas Joel*, struck the appropriate balance

57 *See Moccio*, 95 F.3d. at 200. The language that the *Moccio* court quotes, however, does not support its reading: "[T]he federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Id.* (quoting *Pennzoil*).

58 935 F. Supp. 450 (S.D.N.Y. 1996). Another judge in the same district refused to follow *Kiryas Joel* on the grounds that it was in fact implicitly overruled by *Moccio*. *See* Zipper v. Todd, No. CIV.5198, 1997 WL 181044, at *3 (S.D.N.Y. Apr. 14, 1997).

59 *Kiryas Joel*, 935 F. Supp. at 455 (quoting Texaco, Inc. v. Pennzoil Co. 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987)).

60 *Id.*

61 Port Auth. Police Benevolent Ass'n v. Port Auth., 973 F.2d 169, 172 (3d Cir. 1992).

between *Moccio* and *Kiryas Joel.* In *Sassower v. Mangano*,[62] the court described *Rooker-Feldman* as barring claims "which seek relief that, if granted, would modify a state court judgment."[63] Had this test been applied in *Kiryas Joel*, the federal court would not have had jurisdiction because its injunction would have modified—indeed nullified—the state court's own injunction. This is true regardless of whether res judicata would have barred the federal action.[64]

Thus, when it comes to claims that were not raised in the state courts, res judicata and *Rooker-Feldman* each apply to a different set of circumstances, although sometimes those circumstances overlap. Courts and commentators who treat *Rooker-Feldman* as a jurisdictional version of res judicata, then, are wrong to conflate the two. And the error goes in both directions: equating the two doctrines sometimes deprives *Rooker-Feldman* of its full reach by applying it only when preclusion doctrines also apply, and sometimes extends the jurisdictional bite of *Rooker-Feldman* into situations that warrant instead only the affirmative defense of res judicata.

C. *Protecting State Court Judgments: The Necessity of Going Beyond Res Judicata*

The *Rooker-Feldman* doctrine thus fills gaps in res judicata doctrine that would otherwise wreak havoc on our system of dual courts. Any clever state court defendant, and many plaintiffs, could simply recast the dispute litigated in state court to state a federal cause of action based on harm arising from the suit itself. As long as he either waited until the state court proceedings had terminated or did not seek to enjoin the state proceedings, neither preclusion doctrines nor *Younger* abstention would necessarily bar his federal suit. Nevertheless, allowing a civil litigant a second bite at the trial court apple is inconsistent with the statutory scheme that seems to contemplate the Supreme Court as the only federal court permitted to review state court civil decisions.

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62 927 F. Supp. 113 (S.D.N.Y. 1996), *aff'd*, 122 F.3d 1057 (2d Cir. 1997) (unpublished table decision).

63 *Id.* at 119. The court cited only *Rooker* and *Feldman* in support, omitting any mention of Second Circuit cases. Perhaps this omission enabled the court to state the doctrine correctly.

64 Courts have also struggled with the question of exactly *when* a general challenge to state rules is inextricably intertwined with a forbidden challenge to a particular application of those rules. Because that question is not related to the differences between *Rooker-Feldman* and res judicata, I do not address it here; it is considered at *infra* notes 92–105 and accompanying text.

These illustrations highlight an important underlying difference between *Rooker-Feldman* and res judicata. While preclusion doctrines serve many purposes—including finality and forcing parties to make the first trial "the main event"—the *Rooker-Feldman* doctrine is first and foremost an integral part of judicial federalism. Res judicata is about parties; *Rooker-Feldman* is about courts. That difference explains why *Rooker-Feldman*, unlike res judicata, is a jurisdictional doctrine rather than an affirmative defense. It also explains why state law, complete with individual variations, governs preclusion questions, but *Rooker-Feldman* is an unvarying federal doctrine.

One commentator has suggested that the *Rooker-Feldman* doctrine is better than res judicata law because, unlike the state preclusion doctrines applicable under § 1738 (the Full Faith and Credit Act), it is nationally uniform.[65] Others have criticized this argument, contending that *Rooker-Feldman* is inconsistent with § 1738 because it gives *more* preclusive effect to a state court judgment than it would receive under state law.[66] Both sets of scholars have missed the point. Although courts frequently confuse *Rooker-Feldman* and res judicata, they serve distinct purposes and are therefore used in different—albeit sometimes overlapping—situations.

Res judicata doctrines have no inherent federalism component. The constitutional and statutory provisions on full faith and credit take federalism into account, but are really just a way to eliminate the disparities that might arise in any system of multiple jurisdictions. The *Rooker-Feldman* doctrine, on the other hand, is specifically about federalism—under what circumstances may federal courts other than the Supreme Court sit in judgment on state courts? An uncontroversial aspect of *Rooker-Feldman* illustrates this federalism element of the doctrine. Petitions for habeas corpus are an explicit exception to *Rooker-Feldman*, so that lower federal courts *do* serve as courts of appeal for state court criminal convictions. Overlaid on top of the scheme that allows federal court review of state criminal convictions, however, are doctrines of deference and preclusion.[67] *Rooker-Feldman* and the habeas exception to it tell federal courts *when* they may review state court decisions; preclusion rules tell them *how* to treat those deci-

65 Currie, *supra* note 11, at 324.

66 *See* Beermann, *supra* note 26, at 341; Thompson, *supra* note 25, at 912–13; *see also* Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 384 (1985) (holding that § 1738 prohibits federal courts from giving *greater* preclusive effect to a state court judgment than another state court would give it).

67 Those doctrines have changed over time. *Compare* Townsend v. Sain, 372 U.S. 293 (1963) and 28 U.S.C. § 2254(d) (1966), Pub. L. No. 89-711, *with* 28 U.S.C. § 2254(d) (1998).

sions. The former issue sounds purely in federalism, while the latter can arise in any context, including between states.

One way to illustrate the need for the *Rooker-Feldman* doctrine as a way of managing multiple issues of judicial federalism is to look at cases raising exactly the converse problem. What happens when a party who loses in federal court tries to attack that judgment in state court?

Imagine a case in which a plaintiff files suit in federal court and loses on the merits. He then files suit against the same defendant in state court, seeking relief for the same course of conduct, but this time under state law. What are defendant's options? Defendant can, of course, raise the preclusive effect of the federal judgment as an affirmative defense. Applying federal res judicata law, as it must, the state court should dismiss the suit as precluded. But defendant has another option; under the All Writs Act,[68] he can ask the federal court to enjoin the state suit. As the Supreme Court has noted, courts have "repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued."[69]

The Anti-Injunction Act will not bar relief because it allows a federal court to issue an injunction against a state court in order to "protect or effectuate its judgment."[70] If the federal court, applying federal res judicata law, finds that its judgment would be given preclusive effect in the state lawsuit, then it may enjoin the state suit to protect and effectuate its judgment. The state court is thus deprived of the opportunity to apply federal res judicata law itself. The same approach also works when a losing federal court defendant seeks to undo a plaintiff's victory by seeking conflicting relief from a state court.

And although this provision of the Anti-Injunction Act is often called the "relitigation exception," it is not limited to cases in which

68 28 U.S.C. § 1651(a) (1994) ("[T]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

69 United States v. New York Tel., 434 U.S. 159, 172 (1977); *accord In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1431 (2d Cir. 1993).

70 28 U.S.C. § 2283 (1994) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment."). Some courts also rely on the exception authorizing injunctions "in aid of jurisdiction." *See, e.g.*, Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1202–03 (7th Cir. 1996); Wesch v. Folsom, 6 F.3d 1465, 1470 (11th Cir. 1993).

the first federal judgment would be given preclusive effect in the state suit.[71] Courts have described the reach of the relitigation exception in terms that are strikingly similar to the standard characterizations of *Rooker-Feldman*. Thus, courts have held that the exception authorizes injunctions against state court suits that threaten to "nullify,"[72] "frustrate,"[73] "eviscerate,"[74] "destroy the effect of,"[75] or "render impotent"[76] the federal judgment. Courts have frequently enjoined state suits that seek injunctive relief that would conflict with a prior federal judgment.[77] One court characterized the issuance of an injunction against state court proceedings as appropriate to prevent "judicial hopskotch."[78]

Many of the courts discussing the relitigation exception in these terms do not focus on the res judicata effect of the prior judgment, but rather on the effect a state suit has on the federal judgment.[79] They also allow injunctions even when the federal judgment might

71 One commentator has suggested that cases extending the relitigation exception beyond res judicata—or, for that matter, extending the "in aid of jurisdiction" exception beyond in rem cases—is inconsistent with Supreme Court precedent. Michael Finch, *Fairness and Finality in Institutional Litigation: The Lessons of School Desegregation*, 4 GEO. MASON U. CIV. RTS. L.J. 109, 184–94 (1994). Nevertheless, as the next few paragraphs of text and their accompanying footnotes demonstrate, lower courts do it all the time. *See also* Monaghan, *supra* note 26, at 1159 n.49. For a general analysis of the Anti-Injunction Act, see Martin Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717 (1977).

72 *See, e.g.*, NLRB v. Schertzer, 360 F.2d 152, 153 (2d Cir. 1966); Kaempfer v. Brown, 684 F. Supp. 319, 322 (D.D.C. 1988), *aff'd per curiam*, No. 88–7102, 1989 WL 45103 (D.C. Cir. May 2, 1989); *In re* National Student Mktg. Litig., 655 F. Supp. 659, 662 (D.D.C. 1987); Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 585 F. Supp. 770, 782 (E.D. Pa. 1984); United Transp. Union v. Long Island R.R., 509 F. Supp. 1300, 1307 (E.D.N.Y.), *rev'd on other grounds*, 634 F.2d 19 (2d Cir. 1980), *rev'd on other grounds*, 455 U.S. 678 (1982); Crews v. Radio 1330, Inc., 435 F. Supp. 1002 (N.D. Ohio 1977); Texaco, Inc. v. Melso, No. CIV.A.86-2716, 1986 WL 9596, at *3 (E.D. Pa. Sept. 2, 1986), *modified on other grounds*, No. CIV.A.86-2716, 1986 WL 12018 (E.D. Pa. Oct. 22, 1986).

73 *See, e.g.*, United Indus. Workers of Seafarers Int'l Union v. Board of Trustees, 400 F.2d 320, 334 (5th Cir. 1968).

74 *Roodveldt*, 585 F. Supp. at 783.

75 United States v. Ford Motor Co., 522 F.2d 962, 966 (6th Cir. 1975).

76 *United Industrial Workers*, 400 F.2d at 331.

77 *See, e.g.*, Thomason v. Cooper, 254 F.2d 808 (8th Cir. 1958); United States v. Washington, 459 F. Supp. 1020, 1105 (W.D. Wash. 1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981); United States v. Texas, 356 F. Supp. 469 (E.D. Tex. 1972), *aff'd*, 495 F.2d 1250 (5th Cir. 1974).

78 *In re* Ocean Ranger, 617 F. Supp. 435, 436 (E.D. La. 1985).

79 *See, e.g.*, Kaempfer v. Brown, 684 F. Supp. 319 (D.D.C. 1988), *aff'd per curiam*, No. 88-7102, 1989 WL 45103 (D.C. Cir. May 2, 1989); *Roodvelt*, 585 F. Supp. at 770; United Transp. Union v. Long Island R.R., 509 F. Supp. at 1300 (E.D.N.Y.), *rev'd on*

not be res judicata in the state suit. One court noted that the state suit need not "involv[e] matters identical to those litigated in federal court"[80] and another granted an injunction "even though a different legal theory of recovery [was] advanced in the second suit."[81] Unlike res judicata, which does not always apply to interlocutory orders, the relitigation exception permits injunctions to protect federal interlocutory orders, including discovery orders.[82] Courts sometimes even grant injunctions barring state court suits by persons not parties to the original federal case.[83]

As with the *Rooker-Feldman* doctrine, the overlap between res judicata and the relitigation exception is not complete in either direction; as one court noted, "the existence of a res judicata or collateral estoppel defense in a state action based on a prior federal adjudication does not always warrant the issuance of an injunction against the state proceedings."[84] Indeed, several circuits have interpreted a recent Supreme Court case to hold that the res judicata aspect of the relitigation exception allows injunctions only if the state case raises issues that were actually litigated in the federal case, regardless of whether other claims—such as those that could have been raised in the original state suit—might also be precluded.[85]

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other grounds, 634 F.2d 19 (2d Cir. 1980), *rev'd on other grounds*, 455 U.S. 678 (1982); Crews v. Radio 1330, Inc., 435 F. Supp. 1002 (N.D. Ohio 1977).

80 *United Transportation Union*, 509 F. Supp. at 1307, *rev'd on other grounds*, 634 F.2d 19 (2d Cir. 1980), *rev'd on other grounds*, 455 U.S. 678 (1982).

81 Silcox v. United Trucking Serv., 687 F.2d 848, 852 (6th Cir. 1982).

82 *See* Winkler v. Eli Lilly & Co., 101 F.3d 1196 (7th Cir. 1996); Carlough v. Amchem Prods., 10 F.3d 189 (3d Cir. 1993); Sperry Rand Corp. v. Rothlein, 288 F.2d 245 (2d Cir. 1961); ONBANCorp. v. Holtzman, No. 96-CV-1700, 1997 WL 381779 (N.D.N.Y. June 27, 1997), *aff'd*, 125 F.3d 844 (2d Cir. 1997) (unpublished table decision).

83 *See, e.g.*, *In re* Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985); NLRB v. Schertzer, 360 F.2d 152 (2d Cir. 1966); *ONBANCorp.*, 1997 WL 381779; United States v. International Bhd. of Teamsters, 896 F. Supp. 1349 (S.D.N.Y. 1995), *modified and remanded on other grounds*, 86 F.3d 271 (2d Cir. 1996); Mongelli v. Mongelli, 849 F. Supp. 215 (S.D.N.Y. 1994); *In re* Tutu Water Wells Contamination Litig., 157 F.R.D. 367 (D.V.I. 1994); United States v. Washington, 459 F. Supp. 1020, 1105 (W.D. Wash. 1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981); Hayward v. Clay, 456 F. Supp. 1156 (D.S.C. 1977); *Crews*, 435 F. Supp. at 1002. *But see* Sanguigni v. Pittsburgh Bd. of Pub. Educ., 968 F.2d 393 (3d Cir. 1992); Alton Box Bd. Co. v. Esprit de Corp., 682 F.2d 1267 (9th Cir. 1982).

84 Texaco, Inc. v. Melso, No. CIV.A.86-2716, 1986 WL 9596, at * 7 (E.D. Pa. Sept. 2, 1986), *modified on other grounds*, No. CIV.A.86-2716, 1986 WL 12018 (E.D. Pa. Oct. 22, 1986).

85 *See In re* G.S.F. Corp, 938 F.2d 1467 (1st Cir. 1991); American Town Ctr. v. Hall 83 Assocs., 912 F.2d 104 (6th Cir. 1990); Nationwide Mut. Ins. v. Burke, 897 F.2d 734 (4th Cir. 1990); Staffer v. Bouchard Transp. Co., 878 F.2d 638 (2d Cir. 1989); Texas

In short, the courts have interpreted the All Writs Act and the Anti-Injunction Act together to permit federal courts to enjoin any state suit that interferes with or that might serve to nullify or destroy the effectiveness of a prior federal judgment.

Now consider a second case. This time, a party who loses on the merits in *state* court tries to file a similar lawsuit in *federal* court. As in the previous example, the defendant can raise the preclusive effect of the state court judgment as an affirmative defense, and the federal court must similarly apply the res judicata law of the state that issued the judgment. But the parallels end there. Under *Donovan v. City of Dallas*,[86] the state court cannot enjoin the federal suit, even if it finds that state law would give preclusive effect to its earlier ruling or that the federal suit would interfere with or nullify the existing state judgment.

The *Rooker-Feldman* doctrine reduces the disparity between these two situations by depriving the federal court of the opportunity to oversee state court judgments. It essentially directs federal courts to "enjoin" themselves in situations in which they would have power to enjoin a state court. It makes sense to treat the two converse situations similarly. Both raise similar problems of judicial federalism, and each cries out for a way to protect the integrity of judgments from disappointed litigants seeking a potentially more hospitable forum. In each case, res judicata principles can protect the winning party, but cannot always protect the court; sometimes, for example, the second suit is brought by (or against) strangers to the first suit or on a sufficiently different theory of recovery to bar the application of preclusion doctrines.

Even when *Rooker-Feldman* overlaps with res judicata doctrine, the Anti-Injunction Act's relitigation exception provides additional insight into why we might want to apply the jurisdictional bar of *Rooker-Feldman* rather than preclusion principles. We must begin by noting that in its narrowest, "res judicata only" form, the relitigation exception is an anomaly. It is a deviation from the ordinary rule in multiple cross-jurisdictional lawsuits—the *second* court should normally apply the res judicata law of the *first* forum. Under the Full Faith and Credit Act, the Full Faith and Credit Clause of the Constitution, and federal com-

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Employers' Ins. Ass'n v. Jackson, 862 F.2d 491 (5th Cir. 1988). *But see* Western Sys., Inc. v. Ulloa, 958 F.2d 864 (9th Cir. 1992). All these cases interpreted *Chick Kam Choo v. Exxon*, 486 U.S. 140 (1988). For a critique of this interpretation of *Chick Kam Choo*, see George Martinez, *The Anti-Injunction Act: Fending Off the New Attack on the Relitigation Exception*, 72 NEB. L. REV. 643 (1993).

86 377 U.S. 408 (1964); *accord* General Atomic Co. v. Felter, 434 U.S. 12 (1977).

mon law,[87] respectively, federal courts determine the preclusive effect of earlier state judgments, state courts determine the preclusive effect of earlier judgments by the courts of a different state, and federal courts determine the preclusive effect of prior judgments of another federal court. Only when the first court is federal, and the second state, is the second court deprived of its normal responsibility to determine the preclusive effect of the first court's judgment.

One might defend this anomaly by arguing that state courts will not adequately protect prior federal judgments. This argument, of course, implicates the whole question of the parity between state and federal courts. Whatever may be said of academic commentators,[88] it is clear that the federal courts—and especially the United States Supreme Court—do not currently look with much favor on arguments that depend on asserting a lack of parity between state and federal courts. Much of current federal courts doctrine assumes that state courts are as able, and as willing, to enforce federal law as are federal courts.[89]

87 *See, e.g.*, Heck v. Humphrey, 512 U.S. 477, 488 n.9 (1994) (noting that state courts use federal common law to determine preclusive effect of prior federal judgments).

88 For a sampling of various positions in the voluminous literature on the parity debate, see, for example, Ann Althouse, *Federal Jurisdiction and the Enforcement of Federal Rights: Can Congress Bring Back the Warren Era?*, 20 LAW & SOC. INQUIRY 1067 (1995); Paul Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991); Robert Cover & Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Richard Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988); Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530 (1989); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Martin Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 U.C.L.A. L. REV. 329 (1988); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Federal Courts*, 71 B.U. L. REV. 609 (1991).

89 *See, e.g.*, Matsushita Elec. Indust. v. Epstein, 516 U.S. 367 (1996) (holding that federal court must give res judicata effect to valid state court judgment even when federal court has exclusive jurisdiction); Teague v. Lane, 489 U.S. 288 (1989) (novel claims not cognizable on habeas); Parsons Steel v. First Alabama Bank, 474 U.S. 518 (1986) (federal court must follow state court's interpretation of federal res judicata law); Stone v. Powell, 428 U.S. 465 (1976) (Fourth Amendment claims not cognizable on habeas); Edelman v. Jordan, 425 U.S. 651 (1974) (§ 1983 does not abrogate Eleventh Amendment immunity); Younger v. Harris, 401 U.S. 317 (1971) (federalism principles prohibit federal court from enjoining state proceeding even when Anti-Injunction Act allows); Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) (presumption of concurrent jurisdiction). *But see* Mitchum v. Foster, 407 U.S. 225 (1972) (§ 1983 is express exception to Anti-Injunction Act); England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411 (1964) (allowing plaintiff to return to federal court to litigate

In any case, determining whether the relitigation exception is defensible on parity grounds does not end the inquiry. Even if the exception is not defensible on parity grounds, it makes little sense to compound the error by extending the anomaly to the state-court-federal-court sequence (as I argue *Rooker-Feldman* essentially does), so we need a further justification for that move. And if the relitigation exception *is* defensible on parity grounds, there may also be other reasons to throw res judicata questions back to the court that issued the first judgment—at least when the courts are in different jurisdictions—and those reasons might apply to state court judgments as well as to federal court judgments.

I suggest that there is at least one other reason: res judicata law, despite its apparent simplicity, can be very difficult to apply. It is sometimes difficult enough to determine exactly what the first court decided; the judge who decided the case is usually in the best position to do so. But even when the judgment itself is fairly clear, res judicata doctrines differ tremendously between jurisdictions. While both claim preclusion and issue preclusion can be sufficiently defined for general purposes, the devil is in the details. States diverge considerably not only on such relatively easy questions as the requirement of mutuality and how to treat alternative holdings, but also on such fact-bound determinations as what constitutes a single "claim," when parties are in privity, and whether a particular judgment is "on the merits."[90]

Thus, to the extent that both the relitigation exception and the *Rooker-Feldman* doctrine overlap with res judicata doctrines, they are justifiable as a way to allow the jurisdiction most familiar with both the judgment and the applicable preclusion doctrines the first chance to make these difficult determinations.[91] And to the extent that both the relitigation exception and the *Rooker-Feldman* doctrine extend beyond preclusion law, they are justifiable under principles of judicial federalism. Both doctrines operate to keep one set of courts from undermining or overseeing the judgments of the other. As long as

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federal questions); *Ex parte* Young, 209 U.S. 123, 176 (1908) (creating loophole in Eleventh Amendment over Justice Harlan's objection that "a decent respect for the States requires us to assume . . . that the state courts will enforce every right secured by the Constitution").

90 For an excellent comprehensive overview of many such differences, see Erichson, *supra* note 35.

91 As one commentator has pointed out, the first jurisdiction also has the greatest interest in applying its own preclusion doctrines, because preclusion doctrines greatly affect litigation behavior in the *first* suit but not the second suit. *See* Erichson, *supra* note 35.

state courts cannot protect their own judgments by enjoining federal lawsuits—and allowing them to do so would be fraught with danger for the federal courts—the *Rooker-Feldman* doctrine offers state courts a modicum of the protection that the relitigation exception provides to federal court judgments.

III. HARD QUESTIONS

With these background principles in mind, we can proceed to the questions that vex courts trying to apply the *Rooker-Feldman* doctrine.

A. General vs. Particular Claims

As we have seen, the *Rooker-Feldman* doctrine does not apply directly to claims that could have been raised in the state suit but were not. In particular, unless an unraised claim is inextricably intertwined with the state judgment, *Rooker-Feldman* does not deprive the federal court of jurisdiction. In *Feldman* itself, the Supreme Court held that a general challenge to bar admission rules was not inextricably intertwined with a particular denial of admission and thus could be raised in the federal suit (unless it was barred by preclusion principles, a question the Court did not address).

Courts have had some difficulty sorting out the difference between general and particular claims and identifying when a general challenge is inextricably intertwined with a challenge to a state court judgment. The issue arises most commonly in the context of challenges to state bar rules on admission and discipline. When an applicant has been denied admission, or an attorney disciplined, under a state rule, the denial or disciplinary action itself is an adjudicative act that triggers *Rooker-Feldman.* The federal court thus cannot review the application of the rule to the particular plaintiff. But what of challenges to the rule itself? Courts have reached conflicting results. Most courts have found, following *Feldman,* that a challenge to state bar admission rules is general and have thus exercised jurisdiction over such challenges, even while refusing to overturn the denial of admission to the particular plaintiff.[92] But other courts have labeled

92 *See, e.g.,* Kirkpatrick v. Shaw, 70 F.3d 100 (11th Cir. 1995); Schumacher v. Nix, 965 F.2d 1262 (3d Cir. 1992); Centifanti v. Nix, 865 F.2d 1422 (3d Cir. 1989) (reinstatement); Nordgren v. Hafter, 789 F.2d 334 (5th Cir. 1986); Tofano v. Supreme Court of Nev., 718 F.2d 313 (9th Cir. 1983); Lowrie v. Goldenhersh, 716 F.2d 401 (7th Cir. 1983); Diaz v. Moore, 861 F. Supp. 1041 (N.D. Fla. 1994); Scariano v. Justices of the Supreme Court of Ind., 852 F. Supp. 708 (S.D. Ind.), *aff'd,* 38 F.3d 920 (7th Cir. 1994); Giannini v. Real, 711 F. Supp. 992 (C.D. Cal. 1989), *aff'd,* 911 F.2d 354 (9th Cir. 1990); Baccus v. Karger, 692 F. Supp. 290 (S.D.N.Y. 1988); Helminski v. Supreme

identical challenges as unsuccessful attempts to recast a particular claim as a general one, or have held the two to be inextricably intertwined, and have applied *Rooker-Feldman* to bar jurisdiction.[93] Courts have similarly split over whether to apply *Rooker-Feldman* to prohibit challenges to general rules in attorney discipline cases and related contexts.[94] As one commentator has noted, the distinction between general and particular challenges "remains subject to the court's reading of a plaintiff's complaint."[95]

The difference between general and particular challenges, however, should not depend on the plaintiff's complaint, but on the plaintiff's situation. The Tenth Circuit recognized this in *Facio v. Jones*.[96] In that case, the state court issued a default judgment against Facio. He moved in state court to set aside the judgment, but his motion was denied because he failed to present proof of a meritorious defense as required by state rules. Facio then filed a § 1983 suit in federal court, challenging both the failure to set aside the default judgment and the state rules requiring that a default debtor show a meritorious defense in order to set aside a judgment. Although the district court held the state rules unconstitutional, the Tenth Circuit reversed on the ground that *Rooker-Feldman* precluded the federal courts from exercising jurisdiction over even the challenge to the rules.

The Court of Appeals based its *Rooker-Feldman* holding on principles of standing. Facio, the court reasoned, could only establish standing to challenge the general rules if he could also upset the particular default judgment against him. As the court put it, Facio could not "demonstrate any continuing interest in having Utah's default judgment rules set aside," because the judgment against him would not be overturned even if the rules turned out to be unconstitu-

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Court of Colo., 603 F. Supp. 401 (D. Colo. 1985); Rosenfeld v. Clark, 586 F. Supp. 1332 (D. Vt. 1984), *aff'd*, 760 F.2d 253 (2d Cir. 1985) (unpublished table decision); Levanti v. Tippen, 585 F. Supp. 499 (S.D. Cal. 1984).

93 *See, e.g.*, Johnson v. Kansas, 888 F. Supp. 1073 (D. Kan. 1995), *aff'd*, 81 F.3d 172 (10th Cir. 1996).

94 *Compare* Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984) (*Rooker-Feldman* did not bar suit), *with* Bell v. Legal Adver. Comm., 998 F. Supp. 1231 (D.N.M. 1998) (*Rooker-Feldman* barred suit). *Cf.* Facio v. Jones, 929 F.2d 541 (10th Cir. 1991) (*Rooker-Feldman* barred general challenge to rules governing default judgment in suit brought by state court default judgment debtor); Mounkes v. Conklin, 922 F. Supp. 1501 (D. Kan. 1996) (*Rooker-Feldman* did not bar general challenge to bail bond rules, brought by arrestees to whom they had been applied).

95 Thompson, *supra* note 25, at 892.

96 929 F.2d 541 (10th Cir. 1991). They were not always so certain of the distinction. *See Razatos*, 746 F.2d at 1429 (holding that *Rooker-Feldman* did not bar suit in attorney discipline case).

tional.[97] Thus, his general claim was inextricably intertwined with his particular claim, and *Rooker-Feldman* precluded federal jurisdiction over both. The court carefully distinguished bar admission cases; in those cases, "even though the federal district court could not reverse the adverse state court judgment that had been rendered against the plaintiffs, the plaintiffs still had standing because they could reapply to the state's bar."[98]

Thus, the crucial distinction between particular claims barred by *Rooker-Feldman* and general claims allowed despite the doctrine should rest on whether the federal plaintiff would have standing to challenge the general rules, even though the particular state judgment against him will stand. In general, the standing analysis in *Rooker-Feldman* cases will turn on whether the plaintiff can show that he is likely to be subject to the challenged rule again.[99] Thus, challenges to bar admission rules should always be permitted—unless, of course, the state court has actually *ruled on* the general challenge—but challenges to bar discipline rules should not be permitted unless the plaintiff claims an interest in repeating the conduct.[100]

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97 *See Facio*, 929 F.2d at 545.

98 *Id.*

99 *See* Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976). In both of these cases, the Supreme Court held that past victims of alleged police brutality had no standing to request injunctive relief against future acts since they could not show a likelihood that they would again be victims. The Supreme Court later described the rule in these and similar cases: "Our cases reveal that, for purposes of assessing the likelihood that state authorities will reinflict a given injury, we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." Honig v. Doe, 484 U.S. 305, 320 (1988). Regardless of the soundness of this reasoning for resolving questions of *standing*, it works well for determining whether a general claim is inextricably related to a particular claim.

100 This may sound unlikely, but it can happen. For example, in *Bell v. Legal Advertising Committee*, 998 F. Supp. 1231 (D.N.M. 1998), an attorney challenged rules that required submission of advertisements to a bar committee for approval. He had been disciplined for running eight advertisements that had been rejected by the committee, but he also sought a federal declaration that he was entitled to run eleven other advertisements that were not part of the disciplinary proceedings. He also challenged the state's general ban on advertisements that included testimonials or endorsements. Despite the disciplinary context, the court correctly recognized that it had jurisdiction over the challenge to the antitestimonial rule. As for the eleven advertisements, the court appeared a bit confused. After concluding that, because there had been no judicial decision concerning the eleven advertisements, "the *Feldman* doctrine may not be directly implicated," *id.* at 1235, the court went on to hold that the plaintiff was required to exhaust his state remedies before bringing the federal suit. In support of this rather unusual holding, *see Patsy v. Board of Regents*, 457 U.S. 496 (1982) (noting

This standing analysis can serve to reconcile two seminal Third Circuit cases that at least one commentator has labeled "inconsistent."[101] In *Stern v. Nix*,[102] a disbarred attorney sought to challenge the procedures for disbarment. The court held the federal claim barred by *Rooker-Feldman*. A year later, in *Centifanti v. Nix*,[103] the court held that *Rooker-Feldman* did not bar federal jurisdiction over a suit by a disbarred attorney seeking to challenge rules regarding reinstatement. The *Centifanti* court distinguished *Stern* on the grounds that the plaintiff in *Centifanti* "sought only prospective relief"; such relief "could affect future decisions of the state supreme court [but] would not require review of a past decision."[104] The more cogent distinction between the two cases might be better characterized under the *Facio* approach; while Stern was unlikely to be disbarred again, and therefore had no continuing interest in the disbarment rules except to the extent his own disbarment could be reversed, Centifanti would almost certainly reapply for reinstatement and thus remained interested in whether the reinstatement rules were constitutional.[105]

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that exhaustion is not required in § 1983 suits), the court cited, among other things, the *Feldman* case.

101 Thompson, *supra* note 25, at 892–93.

102 840 F.2d 208 (3d Cir. 1988).

103 865 F.2d 1422 (3d Cir. 1989).

104 *Id.* at 1430.

105 Lower courts in the Third Circuit have had difficulty applying these two cases; that difficulty might have been eased had the Third Circuit applied the *Facio* approach. For example, in *Hunter v. Supreme Court of New Jersey*, 951 F. Supp. 1161 (D.N.J. 1996), *aff'd*, 118 F.3d 1575 (3d Cir. 1997), the plaintiff, a state court judge, filed suit in federal court challenging a reprimand issued to him by the state supreme court. In addition to seeking damages and an injunction overturning the reprimand, he also challenged the judicial disciplinary rules themselves, which allowed reprimands in the absence of certain procedural safeguards. The district court correctly dismissed the particular challenges on *Rooker-Feldman* grounds, and also recognized that the challenge to the disciplinary rules was general. After examining the two circuit court precedents, the court concluded that the general challenge was barred by *Rooker-Feldman* because although the plaintiff was "seeking only prospective relief, . . . the purpose of the challenge to the rules [was] to undercut the basis for the private reprimand in order to invalidate" it. *Id.* at 1175. While this is the correct result, the court was unnecessarily caught between the two circuit court cases: one holding that prospective relief is not barred by *Rooker-Feldman* and one looking to the purpose of the general challenge. A better approach might have been to note that since there was little likelihood that the judge would again be subject to the challenged disciplinary rule, he had no standing to challenge it absent an attack on his own prior reprimand. Thus the general challenge was inextricably intertwined with the particular, regardless of *either* the type of relief or his motives. For other examples of cases in which the court could have reached the same result by applying a *Facio* analysis, but instead struggled with these precedents, see *Spencer v. Steinman*, 968 F. Supp. 1011,

B. Suits by Nonparties

Not all *Rooker-Feldman* cases involve the simple complaint of a party who has lost in state court and is now attempting to sue those involved in the earlier litigation. Sometimes the state judgment is collaterally attacked in federal court by someone who was not a party to the state suit. Under ordinary res judicata law, a nonparty in these circumstances can almost never be barred.[106] The question remains, however, whether the subsequent suit belongs in state or federal court. Lower courts have struggled with the question of whether and how to apply *Rooker-Feldman* to suits by nonparties.[107]

The Supreme Court has alluded to the issue without unequivocally deciding it.[108] Several lower courts have thus applied *Rooker-Feldman* even when the federal plaintiff was not a party to the state proceedings, as long as the federal plaintiff was attacking the state judgment.

1016 & n.7 (E.D. Pa. 1997), *Kirby v. City of Philadelphia*, 905 F. Supp. 222 (E.D. Pa. 1995), and *White v. Judicial Inquiry and Review Board*, 744 F. Supp. 658, 667–70 (E.D. Pa. 1990).

106 *See, e.g.*, Richards v. Jefferson County, 517 U.S. 793 (1996); Martin v. Wilks, 490 U.S. 755 (1989); WRIGHT ET AL., *supra* note 25, § 4448; RESTATEMENT (SECOND) OF JUDGMENTS § 34(3) (1982).

107 One commentator concludes that "[t]he doctrine has never been applied against nonparties." Monaghan, *supra* note 26, at 1194. As the cases cited in notes 109–112, *infra*, demonstrate, Professor Monaghan was perhaps too hasty in his conclusion.

108 In *Johnson v. DeGrandy*, 512 U.S. 997 (1994), the Court held that *Rooker-Feldman* did not bar a Voting Rights Act suit by the United States, despite a prior decision by a state supreme court. The Court gave two reasons: the United States was not a party in the state court, *and* "has not directly attacked [the state court judgment] in this proceeding." *Id.* at 1006. Moreover, the Court had already determined that the state judgment should be given no res judicata effect because it was only a "preliminary look at" the particular voting rights claims subsequently at issue in the federal suit. *Id.* at 1005. Either of these alternative reasons alone might support a holding that *Rooker-Feldman* did not bar the suit. It is also possible that suits by the United States should be an exception to the doctrine, as they are to several other doctrines of judicial federalism. *See, e.g.*, United States v. Mississippi, 380 U.S. 128 (1965) (holding that 11th Amendment does not bar federal suit brought against a state by United States); Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957) (holding that Anti-Injunction Act does not prevent United States from obtaining injunction against state court proceeding).

Thus, as I elaborate in the text, a number of lower courts have allowed *Rooker-Feldman* to bar nonparty suits challenging state court judgments since *DeGrandy*; they apparently did not interpret the Supreme Court's brief, equivocal, and conclusory statement as binding precedent. To the extent that *DeGrandy* does automatically preclude the application of *Rooker-Feldman* to nonparties, my analysis in this Article suggests that *DeGrandy* is wrong.

In *Williams v. Adkinson*,[109] a woman claiming to be the illegitimate daughter of deceased country singer Hank Williams sued both Hank Williams, Jr. (Williams, Sr.'s only heir) and the administrators of Williams, Sr.'s estate to recover her share of Williams, Sr.'s considerable continuing royalties. The state trial court ruled in favor of both defendants. Adkinson appealed only the ruling in favor of the administrators to the Alabama Supreme Court; Williams did not seek to intervene despite his obvious interest in the outcome of the appeal. When Alabama's highest court reversed the trial court and remanded the case for distribution of some of the royalties to Adkinson, Williams moved unsuccessfully for leave to appear before the state supreme court. He then filed suit in federal court, seeking to enjoin the state trial court from implementing the supreme court's decree. The federal court found the suit barred by *Rooker-Feldman*.

Another case involving a party who perhaps should have intervened in the state case but did not is *Republic of Paraguay v. Allen*.[110] Paraguay and its ambassador to the United States filed suit in federal court, alleging that the State of Virginia had violated various treaties when it tried and convicted a Paraguayan national—resident in the United States—of crimes committed in Virginia. The Eastern District of Virginia found that it lacked jurisdiction "to disturb a state court ruling regardless of the procedural posture of the litigants."[111] Although the plaintiffs were vindicating their own treaty rights, rather than the prisoner's constitutional rights, they still sought to vacate the sentence imposed by the state court. A few other courts have also assumed without discussion that *Rooker-Feldman* can bar litigants not parties to the state proceedings,[112] and several Court of Appeals judges have expressed doubts that identity of the parties is necessary to trigger the *Rooker-Feldman* doctrine.[113]

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109 792 F. Supp. 755 (M.D. Ala. 1992), *aff'd*, 987 F.2d 774 (11th Cir. 1993) (unpublished table decision).

110 949 F. Supp. 1269 (E.D. Va. 1996), *aff'd on other grounds*, 134 F.3d. 622 (4th Cir. 1997), *cert. denied sub nom.* Republic of Para. v. Gilmore, 118 S. Ct. 1352 (1998).

111 *Id.* at 1273.

112 *See, e.g.*, T.W. & M.W. v. Brophy, 124 F.3d 893 (7th Cir. 1997); Skrzypczak v. Kauger, 92 F.3d 1050 (10th Cir. 1996) (affirming, on other grounds, unreported lower court decision); Dubinka v. Judges of the Superior Court, 23 F.3d 218 (9th Cir. 1994) (holding that *Rooker-Feldman* does not bar because plaintiff is raising general challenge, but not discussing the fact that federal plaintiff was not a party to the state suit); Paul v. Dade County, 419 F.2d 10 (5th Cir. 1969); Khal Charidim Kiryas Joel v. Kiryas Joel, 935 F. Supp. 450 (S.D.N.Y. 1996) (holding that *Rooker-Feldman* did not apply for other reasons); Mazur v. Woodson, 932 F. Supp. 144 (E.D. Va. 1996).

113 *See* Bates v. Jones, 131 F.3d 843, 855–57 (9th Cir. 1997) (en banc) (Rymer, J., concurring), *cert. denied*, 118 S. Ct. 1302 (1998); Roe v. Alabama, 43 F.3d 574, 586

At least when the federal plaintiffs had an opportunity to raise their claims in state court—an issue not directly addressed in *Republic of Paraguay*—this seems to be an appropriate application of *Rooker-Feldman*. The purpose of the doctrine is to prevent federal courts from reviewing state court judgments. This purpose is frustrated by the exercise of federal jurisdiction over suits challenging a state court judgment, regardless of who brings the suit.

The justification for applying *Rooker-Feldman* to nonparties depends on the crucial difference between the doctrine and res judicata. Res judicata is designed to keep losers from relitigating. As such, it is largely limited to parties and those in privity with them; individuals who have not participated in the original litigation can hardly be described as relitigating. *Rooker-Feldman*, on the other hand, is designed to keep the lower federal courts from reviewing state court judgments—a purpose that depends not at all on the identity of the parties. If one accepts that under the current statutory scheme, lower federal courts should not be reviewing state court judgments (the premise of the whole doctrine), it is incongruous to create an exception for nonparties. Nor is it a violation of due process to require an interested party to intervene, as long as the federal plaintiff had notice that the state suit might affect his interest and an opportunity to intervene; Congress has required exactly that type of intervention by parties seeking to upset consent decrees entered in Title VII litigation.[114]

Several circuits have nevertheless articulated an apparently blanket rule against applying the *Rooker-Feldman* doctrine to bar federal suits by persons not parties to the state proceedings. The rule often stems from a mistaken assumption that *Rooker-Feldman* and preclusion doctrines are so closely related that their inapplicability to nonparties should be identical.[115] As I have suggested, the difference in purposes between the two doctrines warrants different treatment of nonparties. In any event, closer examination of the cases purporting to apply such a rule reveals that in most of these cases *Rooker-Feldman* would not have prevented jurisdiction in any case. Indeed, there are few cases in which a refusal to apply *Rooker-Feldman* could only have rested on a

(11th Cir. 1995) (Edmondson, J., dissenting). The majority opinion in *Roe* is discussed *infra* at note 124.

114 *See* 42 U.S.C. § 2000e-2(n)(1)(1994).

115 *See, e.g., Bates*, 131 F.3d at 862 (en banc) (Fletcher, J., concurring in relevant part), *cert. denied*, 118 S. Ct. 1302 (1998); Valenti v. Mitchell, 962 F.2d 288, 298 (3d Cir. 1992).

rule against barring suits by nonparties, and I will argue that they are incorrectly decided.[116]

For example, the Third Circuit purported to apply its blanket rule against using *Rooker-Feldman* to bar nonparties in *E.B. v. Verniero*.[117] The state court in that case had upheld the constitutionality of a state statute requiring registration and community notification for sex offenders ("Megan's Law"), thus allowing it to be applied to the particular sex offenders who had brought the state suit. When new plaintiffs challenged the statute in federal court, however, they were not really seeking to undo the state court *judgment*—indeed, they did not care whether the prior plaintiffs were required to register. They were simply bringing an entirely new case against the same defendants. To find the federal suit barred under *Rooker-Feldman* would essentially deprive the federal courts of jurisdiction whenever a state court had already ruled on the same issue in a different case.

Recognizing the difference between a collateral attack on a state court judgment and a direct attack on a state statute already upheld by a state court might have saved the Ninth Circuit some grief in *Bates v. Jones*.[118] In that case, various state legislators and their constituents challenged Proposition 140, which amended the California Constitution to impose lifetime term limits on state legislators. The California

116 The most egregious such case is *Allen v. Allen*, 48 F.3d 259 (7th Cir. 1995), discussed *infra*. Another case that might arguably depend on the existence of such a rule is *Valenti*, 962 F.2d at 288. In that case, however, the Third Circuit recognized that the state court order at issue might not be adjudicative, and that the federal plaintiffs' suit might also fall into the category of a "general challenge." Since neither general challenges nor challenges to nonadjudicative acts are barred by *Rooker-Feldman*, the court might have relied on either of these possibilities to reach its conclusion that the suit was not barred. Instead it explicitly used the blanket rule to avoid the difficult questions of how to characterize the state court's order and the plaintiffs' request for relief. *See id.* at 297; *see also* Donatelli v. Casey, 826 F. Supp. 131 (E.D. Pa. 1993) (rejecting *Rooker-Feldman* argument without discussion, on grounds that federal plaintiffs were not parties to state proceedings, in complicated redistricting case that might have escaped *Rooker-Feldman* on a variety of grounds, and in which defendants prevailed on merits anyway), *aff'd sub nom.* Donatelli v. Mitchell, 2 F.3d 508 (3d Cir.).

117 119 F.3d 1077 (3d Cir. 1997). Another example of the unnecessary use of a blanket rule in these circumstances is *Bennett v. Yoshina*, 140 F.3d 1218 (9th Cir. 1998), *cert. denied sub nom.*, Citizens for a Constitutional Convention v. Yoshina, 119 S. Ct. 868 (1999).

118 131 F.3d 843 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 1302 (1998). In an earlier case involving similar circumstances the Ninth Circuit seemed to assume that nonparties could be subject to a *Rooker-Feldman* bar, concluding without discussion of the new-party question that *Rooker-Feldman* did not bar the suit because it was a general challenge. *See* Dubinka v. Judges of the Superior Court, 23 F.3d 218 (9th Cir. 1994).

Supreme Court ultimately upheld the amendment, and the United States Supreme Court denied certiorari. After the California Supreme Court had acted, a *different* set of state legislators and their constituents, represented by the same law firm that had litigated the first suit, brought suit in federal court again challenging the constitutionality of Proposition 140. The district court held Proposition 140 unconstitutional, and a panel of the Ninth Circuit affirmed. The panel did not address *Rooker-Feldman*, and it found that the state case was not preclusive because the parties were not identical.

When the case was reheard by the en banc court, a majority reversed the panel and held that Proposition 140 was constitutional. Although the majority did not address the *Rooker-Feldman* question, it did avoid preclusion by a different method than that used by the panel. The en banc majority concluded that a California court would have found the case to be within a "public interest exception" to res judicata doctrine.

Various concurring and dissenting opinions addressed both *Rooker-Feldman* and res judicata. Judge Rymer concluded that both *Rooker-Feldman* and res judicata principles barred the federal suit. Without explicitly concluding that the federal plaintiffs were in privity with the state plaintiffs, she reasoned that the federal plaintiffs "share an identity of interest with, and adequate representation by, the losing parties in" the state suit.[119] Judge Fletcher disagreed vehemently with Judge Rymer, arguing that "*Rooker-Feldman*, like the doctrine of res judicata, is applicable only when the parties in a second action were also parties, or in privity with parties, in a previous state court proceeding."[120] On my analysis, the two judges might have resolved their differences by agreeing that although *Rooker-Feldman* does not require an identity of parties, it does require an attack on the prior judgment. As in *Verniero*, the federal plaintiffs really did not care whether the term limits applied to their state plaintiff counterparts, and thus were not attacking the judgment itself. At the very least, this would have forced both concurring judges—and perhaps the majority as well—to confront the crucial question of whether, under the peculiar circumstances of the case, the federal litigants should have been treated as parties to the state suit.[121]

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119 *Bates*, 131 F.3d at 857.

120 *Id.* at 862.

121 This sensible course might not have resolved the dispute. In other separate opinions, Judge Schroeder and Judge Hawkins did not address the *Rooker-Feldman* question, but each reached a different conclusion with regard to res judicata: Judge Schroeder found the suit barred by res judicata principles because the parties were in privity with one another, and Judge Hawkins found the suit permissible explicitly be-

Another Third Circuit case also relied unnecessarily on a blanket rule against applying *Rooker-Feldman* to nonparties. In *FOCUS v. Allegheny County Court of Common Pleas*,[122] the state judge had issued a gag order against the parties in an ongoing child custody case. FOCUS, an organization interested in publicizing child custody errors, wanted to talk to the parties in the case, at least one of whom would have been willing to talk in the absence of the gag order. FOCUS and several of its members had tried to intervene in the state custody case to challenge the gag order, but the state court refused even to entertain their motion to intervene. Two state appellate courts then refused to take any action at all. When FOCUS and its members brought suit in federal court, the district court dismissed the suit on *Rooker-Feldman* grounds, but the Third Circuit reversed, holding *Rooker-Feldman* inapplicable to nonparties to the state proceeding.

The Court of Appeals need not have relied on so broad a rule. Every court that has considered the issue—including the Third Circuit in a different case—has held that *Rooker-Feldman* does not apply if the federal court plaintiffs were denied a full and fair opportunity to litigate in the state court.[123] Citing analogies to *Younger v. Harris*, to preclusion law, and to habeas corpus doctrines, the federal courts have recognized that a party who has been explicitly denied an opportunity to litigate a substantive claim can hardly be described as "appealing" that claim.[124] The *Rooker-Feldman* doctrine, like most doctrines of judicial federalism, is a forum-shifting device; while it precludes federal attacks on state court judgments, it presumes that those challenges can go forward in state court (unless another doctrine, such as res judicata, bars the state suit). When the procedural posture of the case makes it clear that no such state challenge was ever possible, *Rooker-Feldman* has no application.

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cause the parties were not in complete privity. This same dispute might have divided the court on the *Rooker-Feldman* question as well.

122 75 F.3d. 834 (3d Cir. 1996). *See also* United States v. Owens, 54 F.3d 271 (6th Cir. 1995) (holding that *Rooker-Feldman* does not bar jurisdiction over nonparties, but United States had tried to intervene in state proceeding and had been denied intervention).

123 *See, e.g.*, Valenti v. Mitchell, 962 F.2d 288, 296 (3d Cir. 1992); Wood v. Orange County, 715 F.2d 1543, 1547 (11th Cir. 1983); Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), *vacated and remanded on other grounds*, 477 U.S. 902 (1986).

124 *See* Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995) (rejecting *Rooker-Feldman* argument on dual grounds that federal plaintiffs were not parties to the state proceeding and had no opportunity to litigate their claims); Marks v. Stinson, 19 F.3d 873, 885 & n.11 (3d Cir. 1994) (holding that *Rooker-Feldman* did not bar federal suit not only because it was brought by nonparties but also because the state courts had dismissed the case without reaching the merits).

Two cases illustrate how a party's possible intervention in the state court affects a subsequent *Rooker-Feldman* question in federal court. A district court in the Sixth Circuit, which has a rule purportedly barring the use of *Rooker-Feldman* against nonparties, has recognized the distinction between nonparties who might have intervened and nonparties who had no opportunity to do so. In *Hart v. Comerica Bank*,[125] the court found that it lacked jurisdiction under *Rooker-Feldman*, defining "parties" to include not only actual parties but also persons who "had the opportunity to intervene in [the state] proceedings and doing so was necessary to preserve their rights."[126] The Ninth Circuit also has a blanket rule, but in *Marriott International, Inc. v. Mitsui Trust & Banking Co*,[127] a district court in that circuit applied *Rooker-Feldman* to a party who had been denied the right to intervene in the state court, on the ground that the denial was itself based on the state court's rejection of the very claim the party was attempting to raise in federal court.

A group of cases from the Seventh Circuit provides the most nuanced picture of the question of new plaintiffs. Perhaps Judge Posner best summarized the appropriate stance toward this question: he suggested that when the federal plaintiffs are not parties to the state proceedings, "[t]heir rights have not been adjudicated; and *ordinarily* that would bar the defendants' invocation of *Rooker-Feldman*."[128] But that innocuous statement of abstract principle has bedeviled the Seventh Circuit, as the following contradictory cases illustrate.

In *Leaf v. Supreme Court of Wisconsin*,[129] the court purported to state a blanket rule against applying *Rooker-Feldman* to a federal plaintiff who was not a party to the state proceedings. But as in *E.B. v. Verniero* in the Third Circuit, *Leaf* involved a plaintiff who was not attacking the judgment itself. Leaf had been suspended from the practice of law. She and Haynes, a nonlawyer with whom she worked, sued in federal court alleging, among other things, that the investigation of both Leaf and Haynes was racially motivated and conducted with malicious intent. Although the Seventh Circuit concluded that *Rooker-Feldman* barred Leaf's suit, it held that that doctrine did not bar Haynes' independent suit (although it ultimately held that he lacked standing). As in *Verniero*, Haynes was not seeking to undo Leaf's suspen-

125 957 F. Supp. 958 (E.D. Mich. 1997).

126 *Id.* at 970–71.

127 13 F. Supp.2d 1059 (D. Haw. 1998).

128 Hoover v. Wagner, 47 F.3d 845, 849 (7th Cir. 1995) (emphasis added).

129 979 F.2d 589 (7th Cir. 1992).

sion—nor even necessarily questioning its correctness—but was rather trying to get relief for violation of his own rights.

By contrast, in *T.W. & M.W. v. Brophy*,[130] the Seventh Circuit found that *Rooker-Feldman* did deprive the federal courts of jurisdiction despite the fact that the federal plaintiff had not been a party to the state suit. In that case, Scott Enk attempted to challenge the placement of two minor children with their aunt, alleging that the placement was racially motivated. Enk himself had no relationship to the children and had not been a party to the state proceeding. The court held that Enk's action was barred by *Rooker-Feldman*, noting that the appropriate place for him to raise his claims was in the state courts.

Finally, *Allen v. Allen*[131]—also decided by the Seventh Circuit—is one case that rested squarely on the rule against applying *Rooker-Feldman* to nonparties, and it illustrates how such a blanket rule can circumvent the central purpose of the doctrine. *Allen* involved a woman who gave birth to a child by one man while married to another. The biological father did not originally seek to establish his paternity. When the mother and her first husband divorced, a state judge awarded custody to the mother and visitation rights to the ex-husband (as the putative father). The mother eventually married the biological father, who established paternity. He then sued in federal court seeking an injunction against enforcement of the state visitation order and a declaration that the ex-husband lacked any relationship with the child that would entitle him to visitation rights. Although the federal district court dismissed the suit, partly on *Rooker-Feldman* grounds, the Seventh Circuit held that *Rooker-Feldman* "extend[s] only to parties . . . while specifically leaving nonparties free to pursue their claims."[132]

Allen seems to be exactly the sort of case in which a nonparty to the state proceeding is now seeking to undo the state court's judgment, a suit that should be barred by *Rooker-Feldman*. And despite its failure to follow Judge Posner's careful admonition against an automatic exception to *Rooker-Feldman*, the *Allen* court apparently recognized the problem. After noting that if the biological father had followed state procedures for establishing paternity he *would* have been a party to the underlying state suit, the court stated that "[i]t would indeed be incongruous if Allen's failure to turn to his state court remedies gave him greater rights than someone who had ad-

130 124 F.3d 893 (7th Cir. 1997).

131 48 F.3d 259 (7th Cir. 1995).

132 *Id.* at 261.

hered to these procedures."[133] The court ultimately escaped this incongruity by ruling that the federal courts lacked jurisdiction as a result of the domestic relations exception to federal jurisdiction. Nevertheless, it could not quite extricate itself from *Rooker-Feldman.* In a tour de force of confusion, it concluded that "Allen's amorphous constitutional claims are 'inextricably intertwined' with [the domestic relations] matters that escape our jurisdiction," citing not a domestic relations case but a standard Seventh Circuit *Rooker-Feldman* case.[134]

Thus, despite some circuits' apparent refusal to apply *Rooker-Feldman* to any plaintiff not a party to the state proceeding, the better rule is that the nature of the federal suit and not the party seeking it should determine whether *Rooker-Feldman* bars the suit. A doctrine that is designed to protect state court *judgments* from federal review should not care about the identity of *parties.* A court that strays from this common sense conclusion will end up hopelessly confused—and will often find some other reason to avoid jurisdiction.

The most theoretically difficult nonparty cases involve direct attacks on broad state court injunctions. When the federal plaintiff was a party to the state proceeding, applying the *Rooker-Feldman* doctrine to bar jurisdiction presents no novel problems.[135] But state court injunctions that bind nonparties seem qualitatively different. For example, in *Gottfried v. Medical Planning Services,*[136] the state court had—twelve years prior to the federal suit—issued an injunction barring picketing in front of an abortion clinic. The injunction explicitly applied to all persons with notice of the injunction, whether or not they were parties to the state proceeding. The plaintiff in the federal suit, who had not been a party to the state proceeding (and, indeed, had been only ten years old at the time the injunction was issued) challenged the state injunction as a violation of her federal constitutional rights.

In *Gottfried,* the Sixth Circuit avoided *Rooker-Feldman* by simply holding that the doctrine did not apply when the federal plaintiff was not a party to the state proceeding.[137] But assuming, as I have argued,

133 *Id.*

134 *Id.*

135 In addition to considering *Rooker-Feldman,* some federal courts have also abstained under *Younger v. Harris* on the ground that the state proceeding is still ongoing. *See, e.g.*, Hayse v. Wethington, 110 F.3d 18, 20 (6th Cir. 1997); Port Auth. Police Benevolent Ass'n v. Port Auth., 973 F.2d 169, 173–76 (3d Cir. 1992).

136 142 F.3d 326 (6th Cir.), *cert. denied,* 119 S. Ct. 592 (1998).

137 *See id.* 330; *see also* Kevorkian v. Thompson, 947 F. Supp. 1152, 1165 (E.D. Mich. 1997).

that such a blanket rule is misguided, how should federal courts treat nonparties who attack state court permanent injunctions?

Again, the answer turns on the purpose of the *Rooker-Feldman* doctrine. As a doctrine of *judicial* federalism, it is designed to protect judicial acts: state court judgments. A permanent injunction binding nonparties, however, is a very odd sort of judicial act. As some courts have recognized, it is in many ways more like a statute than it is like an ordinary court judgment.[138] Its application beyond the specific parties and events that prompted it belies its judicial origins. Since *Rooker-Feldman* explicitly applies only to judicial acts—and not to either legislative or administrative acts—its reach ought to be quite limited in the case of these broad continuing injunctions.

Examination of an analogous question is instructive. In 1996, Congress passed the Prison Litigation Reform Act (PLRA),[139] which prohibits federal courts from using injunctions or consent decrees to supervise prison conditions unless certain prerequisites are met. PLRA also requires the dissolution of existing injunctions and consent decrees absent a finding of the same prerequisites. Since the Supreme Court recently held that Congress has no power to reopen final judgments,[140] many inmates have challenged this latter portion of PLRA as an unconstitutional attempt to reopen closed cases. Of the seven circuit courts that have considered this argument, six have rejected it, holding that a continuing decree is not a final judgment for separation of powers purposes.[141]

This nearly universal recognition that continuing injunctions are not identical to other judicial orders bolsters the contention that they should not be treated like other judicial orders for *Rooker-Feldman* purposes. In particular, I suggest that a nonparty who challenges a permanent injunction should be exempt from the general application of *Rooker-Feldman* to nonparties. Just as *Rooker-Feldman* presents no jurisdictional bar to a federal lawsuit challenging a state *statute*, it should

138 *See Gottfried*, 142 F.3d at 331; Hoover v. Wagner, 47 F.3d 845, 847 (7th Cir. 1995).

139 *See* Pub. L. No. 104–34, 110 Stat. 1321, 1321–66 (1996).

140 *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

141 *See* Hadix v. Johnson, 133 F.3d 940 (6th Cir.), *cert. denied*, 118 S. Ct. 2368 (1998); Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1375 (1998); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998); Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2374 (1998); Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996). *But see* Taylor v. United States, 143 F.3d 1178 (9th Cir.), *reh'g en banc granted, opinion withdrawn*, 158 F.3d 1059 (9th Cir. 1998).

not bar federal challenges to the statute-like injunctions at issue in such cases as *Gottfried*.[142]

The question of broad injunctions in fact highlights the key to resolving the dilemma of nonparties attacking state judgments. Due process concerns require that individuals be permitted to attack judgments they played no role in reaching. But *Rooker-Feldman*, unlike res judicata, is not an absolute limit on further litigation but rather a forum-allocation device. Under what circumstances should a nonparty be forced to return to *state* court to challenge a prior state court ruling? In particular, although res judicata law virtually never requires a nonparty to intervene to protect his own right to litigate later, my interpretation of the *Rooker-Feldman* doctrine—apparently adopted by at least some courts—suggests that at least parties with notice of a state lawsuit and a legally cognizable interest in the outcome can be required to intervene or else lose their right to relitigate in federal court. That is why the biological father in *Allen*, the Republic of Paraguay, Hank Williams, Jr., and the potential intervenors in *Comerica Bank*, among others, were or should have been barred by *Rooker-Feldman*, but nonparties bound by a broad injunction should not be barred.

Again, a different doctrine of federal jurisdiction can illuminate why this is a plausible solution. A state prisoner must exhaust his state remedies before petitioning the federal courts for a writ of habeas corpus. If a state court finds that the prisoner has procedurally defaulted—that is, that the prisoner has failed to raise his challenge in a timely manner—that court will reject the claims on procedural grounds rather than on the merits. A whole body of doctrine has grown up to determine under what circumstances a procedural default of this sort bars further review on the merits in federal court. The analogy to nonparties challenging state judgments is clear: both circumstances ask when we should hold someone to their failure to raise a challenge in state court.

Although habeas law has changed over the years, the broadest access to federal courts was during the Warren Court's tenure—in particular, during the brief reign of *Fay v. Noia*.[143] Under *Fay*, a procedural default barred a subsequent federal habeas petition only if the

142 Prohibiting parties to the state proceeding from challenging the injunction in federal court is also analogous to the situation in which a federal plaintiff challenges a state statute. Had that federal plaintiff participated in a case in state court challenging the same statute, *Rooker-Feldman* would bar the federal suit.

143 372 U.S. 391 (1963). *Fay* was essentially gutted by *Wainright v. Sykes*, 433 U.S. 72 (1977), and eventually formally overruled by *Coleman v. Thompson*, 501 U.S. 722 (1991).

prisoner had "deliberately by-passed the orderly procedures of the state courts."[144] In other words, a prisoner could not deliberately withhold a claim from the state courts in order to "save" it for the federal courts—a technique the Supreme Court later described as "sandbagging."[145] Individuals who can intervene in the state proceedings—and who are on notice that their interests are at stake in those proceedings—should be similarly denied access to the federal courts. But individuals with no reason to intervene are in a different situation, and on my theory *Rooker-Feldman* does not bar their subsequent federal suits.

C. *Special Problems: Malpractice Suits and Damages*

In addition to the problems of new parties and general claims, two special contexts have confounded courts trying to define the contours of *Rooker-Feldman.* One is the possibility of malpractice suits against the lawyers who handled the state litigation. The other problem is the reach of the *Rooker-Feldman* doctrine in federal damage suits.

1. Malpractice Suits. In *Kamilewicz v. Bank of Boston Corp.*,[146] a divided en banc Seventh Circuit applied *Rooker-Feldman* to deny jurisdiction over a malpractice suit against the lawyers handling the state litigation. Judges Posner, Easterbrook, and Diane Wood were among the dissenters from this holding.

Kamilewicz involved a class action settlement in an Alabama state court. The settlement provided that attorneys' fees would come out of the award to the class. For some class members, however, their share of the attorneys' fees exceeded the amount they recovered from the settlement. Thus, some class members ended up net losers; their Bank of Boston accounts were debited to pay the lawyers. Kamilewicz was such a class member, and he brought a separate class action suit in federal court against the lawyers for the original class.[147] He al-

144 *Fay*, 372 U.S. at 438.

145 *Wainwright*, 433 U.S. at 89. The term comes from betting in poker and refers to the technique of checking (passing) and then raising; it is thought to mislead one's opponents into making an initial bet on the assumption that one has a weak hand. This is how you can tell a serious poker player from a dilettante—only the dilettantes want to ban sandbagging from the game.

146 92 F.3d 506 (7th Cir.), *reh'g en banc denied*, 100 F.3d 1348 (7th Cir. 1996). For a detailed description of the complex litigation that led to the Seventh Circuit, see Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996).

147 The federal suit also named the bank as a defendant. Whether *Rooker-Feldman* should have barred the suit against the bank depends on whether unnamed class

leged that the lawyers had committed fraud and malpractice—as well as a violation of the federal racketeering statute—in not disclosing the financial realities to class members. The district court dismissed the suit on *Rooker-Feldman* grounds and the Seventh Circuit affirmed. Five judges dissented from a subsequent denial of rehearing en banc.

The panel reasoned that the plaintiffs' injuries were the direct result of the state court judgment, and that any ruling for the federal plaintiffs would necessarily conflict with the state court finding that the settlement, including the fees, was fair and reasonable. As the dissent pointed out, however, the plaintiffs were not seeking to overturn or nullify the judgment; indeed, without the judgment they would not have a compensable loss. The real question was whether a federal ruling that plaintiffs were entitled to damages for malpractice would necessarily imply that the state court's ruling was in error. Neither the majority nor the dissent adequately addressed this question.

What did the Alabama court decide when it approved the class settlement? It decided that the settlement was fair to the class as a whole, that the notice comported with due process, and that the attorneys' fees were reasonable for the work performed. It did *not* decide whether the settlement was in the best interest of any particular plaintiff, whether the attorneys provided sufficient notice to their clients to satisfy the implied contract between the attorneys and their clients, or whether the attorneys had acted properly or ethically. But it is these latter three questions, and not the first three, that would be relevant to Kamilewicz's class action suit for fraud and malpractice.

For example, it is perfectly possible that the Alabama court was correct to approve the class settlement but that, given adequate legal advice, the *Kamilewicz* class members would have opted out. Nothing in a federal court ruling for the plaintiffs would necessarily undermine or conflict with the Alabama court's decree. Thus, the federal suit should not have been barred under the *Rooker-Feldman* doctrine. It is an illustration of the confusion surrounding the *Rooker-Feldman* doctrine that the Seventh Circuit, which has relied on the doctrine very frequently, was so deeply divided—and that neither side adequately addressed the crucial question, which turns out not to be particularly difficult.[148]

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members who allege the state court lacked jurisdiction are subject to *Rooker-Feldman*. *See supra* note 39.

148 The Seventh Circuit seemed more attuned to the differences between malpractice suits and attacks on a judgment in *United States v. 7108 W. Grand Ave.*, 15 F.3d 632 (7th Cir. 1994). In that case, federal plaintiffs sought to undo an earlier forfeiture of their property by claiming that it was the result of their attorney's negligence. The

2. Damages. A second specific question that has puzzled courts is whether *Rooker-Feldman* is applicable to suits for damages. The Seventh Circuit is again divided; this time Judges Posner and Easterbrook are on opposite sides. In *Newman v. Indiana*,[149] Judge Posner wrote for a unanimous panel holding that where "[t]he premise of a suit to obtain damages . . . is that the decisions by the [state] courts were incorrect,"[150] *Rooker-Feldman* bars the suit. Other courts have also held damages actions barred by *Rooker-Feldman*.[151] In *Jackson v. Gardner*,[152] on the other hand, a panel including Judge Easterbrook unanimously concluded that a suit for damages against the judge who presided over the federal plaintiffs' divorce action was not barred by *Rooker-Feldman*, rejecting the district court's conclusion that it lacked jurisdiction. It nevertheless affirmed the dismissal of the action on the ground that the judge was entitled to absolute immunity.

As with the identity of the parties, however, the specific type of relief requested should not matter; if granting it necessitates a finding that the state court ruling was incorrect, then the suit should be barred by *Rooker-Feldman*. This conclusion is supported by Supreme Court doctrine in an analogous context.

In 1973, the Court held that prisoners challenging their state convictions in federal court are required to petition for a writ of habeas corpus (which requires exhaustion of state remedies) rather than su-

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court rejected the argument: "Malpractice, gross or otherwise, may be a good reason to recover from the lawyer but does not justify prolonging litigation against the original adversary." *Id.* at 633. *Rooker-Feldman* was not an issue because the earlier case was in federal court.

The only federal court to confront the *Kamilewicz* precedent in a malpractice case held that it did have jurisdiction over the malpractice suit. The court in *Hart v. Comerica Bank*, 957 F. Supp. 958 (E.D. Mich. 1997), distinguished *Kamilewicz* on the ground that in that case "the malpractice—which was the discrepancy between the fees and the recovery—was the very subject matter of the prior state court proceeding." *Id.* at 977.

149 129 F.3d 937 (7th Cir. 1997).

150 *Id.* at 942

151 *See, e.g.*, Jordahl v. Democratic Party of Va., 122 F.3d 192 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 856 (1998); Long v. Shorebank Dev. Corp., No. 97 C.7289, 1998 WL 30696 (N.D. Ill. Jan. 22, 1998); Hunter v. Supreme Court of N.J., 951 F. Supp. 1161 (D.N.J. 1996), *aff'd*, 118 F.3d 1575 (3d Cir. 1997); Thompson v. McFatter, 951 F. Supp. 221 (M.D. Ala. 1996), *aff'd*, 162 F.3d 97 (11th Cir. 1998) (unpublished table decision); Lal v. Nix, 935 F. Supp. 578 (E.D. Pa. 1996); Johnson v. Odom, 901 F. Supp. 220 (W.D. La. 1995).

152 42 F.3d 1391 (7th Cir. 1994). In a different case two years later, Judge Easterbrook joined a panel opinion finding a *Rooker-Feldman* bar to a suit seeking damages. *See* Young v. Murphy, 90 F.3d 1225 (7th Cir. 1996).

ing under § 1983 (which does not).[153] Thus, it held that a claim for injunctive relief is not cognizable under § 1983, thereby limiting the statutorily authorized federal court power to review state convictions and to order the release of state prisoners. Two decades later, the Court was faced with a case in which a prisoner sought not injunctive relief ordering his release, but damages for unconstitutional actions in the criminal investigation and trial. In *Heck v. Humphrey*,[154] the Court held that the damages claim was not cognizable under § 1983 because "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence."[155] In the *Preiser-Heck* sequence, then, the Court recognized that limits on federal power to review state judgments might be transgressed by different requests for relief.[156] Thus, there should be no difference between federal suits seeking injunctive or declaratory relief and those seeking damages; the underlying test remains whether granting the relief would *either* nullify the state judgment *or* necessarily depend on a finding that the state judgment is erroneous.

IV. Multiple Parties and Multiple Suits: The Case of the Missing Cattle Walkway

I close with a recent case illustrating the need for the *Rooker-Feldman* doctrine.[157] A cattleyard and a landowner entered into a contract under which the cattleyard would pay the landowner annual fees in

153 *See* Preiser v. Rodriguez, 411 U.S. 475 (1973).

154 512 U.S. 477 (1994).

155 *Id.* at 487. *Accord* Edwards v. Balisok, 520 U.S. 641 (1997). Although the Court did not directly apply *Rooker-Feldman* in *Heck*, it did cite *Rooker* in support of its disinclination to expand opportunities for collateral attack. *See Heck*, 512 U.S. at 485.

156 Lower courts are unsure of the exact relationship between *Rooker-Feldman* and *Heck*. Several courts have suggested that *Rooker-Feldman* applies to civil judgments, and *Heck* to criminal convictions. *See, e.g.*, Johnson v. Goldsmith, No. 96-2027, 1997 WL 174097 at *1 n.1 (7th Cir. Apr. 7, 1997); Homola v. McNamara, 59 F.3d 647, 651 (7th Cir. 1995); Lal v. Borough of Kennett Square, 935 F. Supp. 570, 574–75 (E.D. Pa. 1996), *aff'd*, 124 F.3d 187 (3d Cir. 1997) (unpublished table decision). One court has held that in a § 1983 case challenging a conviction, the plaintiff's suit is barred for both reasons: the court lacks jurisdiction under *Rooker-Feldman* and the claim is not cognizable under § 1983. *See* Cass v. Adamsville, 99 F.3d 1138 (6th Cir. 1996). Other courts seem to blur the two doctrines. *See, e.g.*, *Jordahl*, 122 F.3d at 201, *cert. denied*, 118 S. Ct. 856 (1998); Nesses v. Shepard, 68 F.3d 1003 (7th Cir. 1995). Whatever the relationship between the two doctrines (and whatever the soundness of limiting the reach of federal power to review state criminal convictions), *Heck* makes clear that the Supreme Court does not consider the difference between injunctive and compensatory relief to be significant.

157 Canal Capital Corp. v. Valley Pride Pack, Inc., No. 97-CV-2162 (D.Minn. Feb. 20, 1998), *rev'd*, No. 98-1892, 1999 WL 89007 (8th Cir. Feb. 22, 1999).

exchange for an easement allowing cattle to travel over a walkway. The walkway connected two parcels owned by the cattleyard, but traveled over the landowner's property. At some point, the landowner removed the walkway. The cattleyard sued in state court for breach of contract, and the landowner (1) defended on the ground that there was a failure of consideration because the cattleyard had failed to pay the required fees, and (2) attempted to counterclaim for the fees. The counterclaim was dismissed because the landowner had previously assigned that part of the contract to another company. (The relationship between the landowner and the company to whom it assigned the contract was never completely clear, but it was some form of successor.) The case went to trial on the breach of contract claim, with the defense of failure of consideration, and the cattleyard prevailed. The jury found that the landowner had breached the contract by removing the walkway, and awarded damages to the cattleyard as well as ordering the landowner to replace the walkway. The landowner unsuccessfully appealed through the state courts. So far, this is a routine state contract case, but here is where it gets complicated. The third-party company reassigned the contract claims to the original landowner, who then brought suit in federal court (under diversity jurisdiction) to collect the fees. The cattleyard responded by moving to dismiss on both *Rooker-Feldman* and res judicata grounds.

This case represents an illustration of the two justifications for *Rooker-Feldman* that I have discussed in this Article, as well as of the complexity of many *Rooker-Feldman* cases. First, the landowner's federal suit is an obvious attempt to persuade a federal court to undo what a state court has done. If the federal court ruled for the landowner on the merits, it would nullify the state judgment because the cattleyard would essentially have to return most or all of the damages it was awarded; a federal ruling for the landowner would also necessarily rest on a determination that the state court was incorrect when it rejected the landowner's defense. Moreover, the state res judicata issues are exceptionally difficult. The case raises questions of privity (given the assignment and reassignment, as well as the complicated relationship between the two landowning companies), of whether the jury necessarily decided the fee question (the landowner never re-

I have a mild personal interest in the case. One of my colleagues, of counsel to a local law firm, participated in the case and occasionally asked my advice on federal jurisdiction matters; the motion to dismiss on both res judicata and *Rooker-Feldman* grounds was argued at my law school (as part of a program to give students the opportunity to learn about motions practice), where the judge ruled from the bench; and the judge who granted the motion is a friend—with whom I have had many interesting discussions about *Rooker-Feldman* and other tricky federal jurisdiction questions.

quested a specific instruction on the defense of failure to pay the fees, and there were no special verdicts), and of whether, under state law, the dismissal of the counterclaim precluded the application of res judicata doctrines. The application of the *Rooker-Feldman* doctrine allowed these difficult questions of state law to be resolved by the state courts.[158] Finally, the case is an illustration of the confusion that reigns in this area. The district court judge thought the case was barred by both *Rooker-Feldman* and preclusion doctrines—but the court of appeals disagreed on both counts, reversing and remanding for trial.

The *Rooker-Feldman* doctrine is an often overlooked, but extremely valuable tool in the management of cross-jurisdictional cases. With little guidance from the Supreme Court, the lower courts have, by and large, managed to shape it into a coherent doctrine. This Article has attempted to provide a systematic overview of, and a justification for, the doctrine, as well as to smooth out the remaining rough edges. Until the Supreme Court steps in to clarify its prior cases, the lower courts will continue to apply the doctrine as best they can. Perhaps this Article will help.

158 The federal court judge did not ultimately dismiss the suit on both *Rooker-Feldman* and res judicata grounds. Technically, of course, once he decided that he lacked jurisdiction under *Rooker-Feldman*, he should not have proceeded to the res judicata questions. Having been reversed before on *Rooker-Feldman* questions, *see* Charchenko v. City of Stillwater, 47 F.2d 981 (8th Cir. 1995), he may, however, be forgiven for an excess of caution.